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Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~590~~ 14

ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, ET AL., APPELLANTS,

vs.

PAUL W. UPDEGRAFF, THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED FEBRUARY 16, 1952

Probable Jurisdiction Noted March 10, 1952

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[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 35160

ROBERT M. WIEMAN and NANCY KENT ZIEBUR, Plaintiffs in Error,

vs.

PAUL W. UPDEGRAFF, Defendant in Error,

vs.

THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, Defendants in Error

PETITION IN ERROR OF ROBERT M. WIEMAN AND NANCY KENT ZIEBER—Filed June 14, 1951

The said Robert M. Wieman and Nancy Kent Ziebur, plaintiffs in error, complain of the said Paul W. Updegraff, defendant in error, for that the said Paul W. Updegraff at the January, 1951, term of the District Court of Oklahoma County, State of Oklahoma, recovered a judgment by the consideration of said court against the said Robert M. Wieman and Nancy Kent Ziebur, and complain of the said The [fol. 2] Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, defendants in error, for that the said The Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, at the said term of said court, recovered a judgment by the consideration of said court against the said Robert M. Wieman and Nancy Kent Ziebur, in a certain action then pending in said court wherein the said Paul W. Updegraff was plaintiff and the said The Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw,

[fol. 24] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 35160

WERNER C. BAUM, SAMUEL HUNT LEE, MALCOLM CORRELL, Lillian A. Schmoe, and Luella R. Nietz, Plaintiffs in Error,

vs.

PAUL W. UPDEGRAFF, Defendant in Error,

vs.

THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, Defendants in Error

PETITION IN ERROR OF WERNER C. BAUM, SAMUEL HUNT LEE, MALCOLM CORRELL, LILLIAN A. SCHMOE AND LUELLA R. NIETZ—Filed June 14, 1951

The said Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz, plaintiffs in error, complain of the said Paul W. Updegraff, defendant in error, for that the said Paul W. Updegraff at the January, 1951, term of the District Court of Oklahoma County, State of Oklahoma, recovered a judgment by the consideration of said court against the said Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz, and complain of the said The Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartright, State Auditor of the State of Oklahoma, defendants in error, for that the said [fol. 25] The Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartright, State Auditor of the State of Oklahoma, at the said term of said court, recovered a judgment by the consideration of said court against the said Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz, in a

certain action then pending in said court wherein the said Paul W. Updegraff was plaintiff and the said The Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, were defendants, and the said Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz were intervenors by permission and order of said court. The original case-made (hereinafter abbreviated (C. M.), duly stipulated, signed, attested and filed, is hereto attached, marked "Exhibit A" and made a part of this Petition in Error, and the said Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe and Luella R. Nietz, plaintiffs in error, aver that there is error in said record and proceedings in this to-wit:

1. Said court erred in overruling the motion of said plaintiffs in error for a new trial, filed in said court May 22, 1951 (C. M. 216) by order entered May 22, 1951 (C. M. 226). [fol. 26] 2. Said court erred in overruling said motion of said plaintiffs in error for a new trial, filed in said court May 21, 1951 (C. M. 206) by order entered May 22, 1951 (C. M. 226).

3. Said court erred in overruling supplemental motion for new trial of said plaintiffs in error filed May 24, 1951 (C. M. 229) by order entered May 24, 1951 (C. M. 233).

4. Said court erred in denying said plaintiffs in error the right to prepare and present suggested findings of fact and conclusions of law (C. M. 84).

5. Said court erred in rendering judgment terminating, or forfeiting the contracts of employment between the said plaintiffs in error and the Board of Regents for Oklahoma Agricultural Colleges (Journal Entry 6th at C. M. 240 and 245).

6. Said court erred in enjoining the Board of Regents of Oklahoma Agricultural Colleges from paying said plaintiffs in error for services rendered said Board of Regents (C. M. 240 and 245).

7. Said court erred in refusing to grant said plaintiffs' in error petition for a mandatory injunction requiring said Board of Regents and said A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State

Auditor of the State of Oklahoma, to make payments to said plaintiffs in error of their compensation due under said contracts of employment.

7a. That the errors assigned under 5, 6, and 7 above constitute error in that the judgment of said court in these respects is declared to be authorized in said judgment by [fol. 27] House Bill No. 8 of the 23rd Oklahoma Legislature, which House Bill No. 8, as applied to said plaintiffs in error by the judgment of said court, violates the constitutional rights of said plaintiffs in error under the following provisions of the Oklahoma Constitution, in that House Bill No. 8, enacted by the 23rd Oklahoma Legislature, and signed by the Governor of the State of Oklahoma April 9, 1951, each section thereof, the Oath set forth in Section 2 thereof, and each word, phrase, clause, sentence or other portion of said Oath constitutes a purported effort by the Legislature of the State of Oklahoma to govern Oklahoma Agricultural and Mechanical College enacted in violation of Article VI, Section 31a, reposing in said Board of Regents the exclusive power to govern said College; and

Constitutes a Bill of attainder and ex post facto law, and a law impairing the obligations of contracts enacted in violation of Article II, Section 2, prohibiting the passing of any Bill of attainder, ex post facto law, or law impairing the obligations of contracts; and

Constitutes the deprivation of liberty and property of said plaintiffs in error without due process of law in violation of Article II, Section 7; and

Constitutes an unlawful delegation of legislative authority to the government of the United States and to an agency and an official thereof in violation of Article V, Section 1, vesting legislative authority in the State Legislature; and [fol. 28] Constitutes the requirement of a religious test for the exercise of civil and political rights in violation of Article 1, section 2, prohibiting such test; and

Constitutes the inclusion of a subject in said House Bill not expressed in the title thereof, insofar as it effects a forfeiture of office or employment in violation of Article V, Section 57; and

Constitutes the exercise of a judicial function by the State Legislature in declaring a forfeiture of office or employment

in violation of Article IV providing that neither branch of government shall exercise the powers properly belonging to either of the other, and in each such respects violates the rights of said plaintiffs in error under said contract of employment, protected by each of said constitutional provisions; and violates the constitutional rights of said plaintiffs in error under the following provisions of the Constitution of the United States:

(a) Article 1, Section 8, providing that Congress shall have the power to raise and support armies, to provide and maintain a navy, to make rules for the government and the regulation of the land and naval forces; to organize, arm and discipline the militia; (that the Congress of the United States of America, prior to the effective date of the Act, did not consent that the State of Oklahoma exercise any of said powers constitutionally delegated to the Congress but did enact a comprehensive, complete and fully integrated legis- [fol. 29] lative scheme in the exercise of each and all of such powers; that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, constitutes a purported attempt to exercise such powers so delegated and now exercised by the Congress of the United States of America);

(b) Article I, Section 10, providing that no state shall pass any Bill of Attai-der or any law impairing the obligation of contracts; (that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, impairs the obligations of said contracts of employment and constitutes a Bill of attainder as to said plaintiffs in error);

(c) Article VI, Section 1, providing that the Constitution and laws of the United States of America which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States of America shall be the supreme law of the land; (that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, violates the Constitution and laws of the United States of America in the particulars heretofore and hereafter enumerated, and is in violation of treaties made under the authority of the United States of America, including the treaty effecting the

membership of the United States of America in the United Nations Organization);

[fol. 30] (d) The Fourteenth Amendment of the Constitution of the United States of America providing that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;

(e) Article II, section 8, delegating to the Congress the power to regulate commerce with foreign nations;

in that House Bill No. 8 enacted by the 23rd Oklahoma Legislature, and signed by the Governor of the State of Oklahoma April 9, 1951, each section thereof, the Oath set forth in section 2 thereof, and each word, phrase, clause, sentence or other portion of said Oath, violates each and all of the said constitutional provisions hereinabove referred to, and violates the rights of plaintiffs in error under said contracts of employment, protected by each of said constitutional provisions.

8. Said court erred in terminating said contracts of employment and in preventing said payment of compensation thereunder when said court in the same judgment in which such denial occurred extended to others in the same class of said plaintiffs in error other and additional protection for their contracts of employment and their rights to receive compensation thereunder as set forth in the 4th, 5th, 8th, 13th and 14th paragraphs of said judgment (C.M. 238; 239, 240, 244 and 245 resp.), hereinafter set forth in paragraphs 13, 14, 17, 22 and 23 respectively.

9. The court erred in its findings of fact because such findings do not include relevant and material facts proved by competent evidence, agreements and stipulations in this case.

[fol. 31] 10. The court erred in concluding that said plaintiffs in error willfully refused to take the oath in that the competent evidence in this case shows that such refusal was not willful and in that whether or not the refusal was willful is a question of fact, which question of fact was not proved in this case.

11. Said court erred in rendering judgment concluding that said plaintiffs in error willfully refused to take the oath and in rendering judgment terminating said contracts of

employment and enjoining the payment of compensation due thereunder (Journal Entry 6th, C.M. 240), when in the same judgment said court afforded protection to others in the same class with plaintiffs in error not taking the oath, by the 4th, 5th, 8th, 13th and 14th parts of said judgment (C.M. 238, 239, 240, 244 and 245 resp.), thus denying to plaintiffs in error the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

In making the following conclusions and in rendering judgment thereupon, said court erred for the reason that each of the following conclusions, and the judgment rendered thereupon, having purportedly been authorized by the provisions of House Bill No. 8 of the 23rd Oklahoma Legislature, is contrary to law, and violates each and all of the provisions of the Constitution of the State of Oklahoma, hereinabove set forth, and the provisions of the Constitution of the United States, hereinabove set forth.

[fol. 32] 12. Said court erred in concluding and rendering judgment that: "the teachers, professors, and other employees of the defendant, Board of Regents, may be paid from State funds for the first nine days of May, 1951; and it is so ordered." (C.M. 238, 3rd.)

13. Said court erred in concluding and rendering judgment that: "each teacher, professor and employee who has wilfully or negligently failed to take and subscribe to the oath, as provided in Section 2, Enrolled House Bill No. 8, by midnight May 9, 1951, cannot be paid from State funds, after midnight May 9, 1951, and concludes that any teacher, professor and employee absent from the State May 9th, 1951, on authorized leave, may be paid regularly and as provided by law during the time of any such absence on authorized leave, and up to and including thirty (30) days after terminating such leave, and up to and returning to work or to the duties of the office or employment of such person; and thereafter in usual and proper form, provided that such person has, during such thirty-day period after returning from said leave, taken said oath in manner and form as prescribed by law, unless an honest mistake or clerical error has been made in any oath that might have been filed, in which event a correction may be made or an amended

State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, were defendants, and the said Robert M. Wieman and Nancy Kent Ziebur were intervenors by permission and order of said court. The original case-made (hereinafter abbreviated C.M.), duly stipulated, signed, attested and filed, is hereto attached, marked "Exhibit A" and made a part of this Petition in Error, and the said Robert M. Wieman and Nancy [fol. 3] Kent Ziebur, plaintiffs in error, aver that there is error in said record and proceedings in this to-wit:

1. Said court erred in overruling the motion of said plaintiffs in error for a new trial, filed in said court May 22, 1951 (C.M. 216) by order entered May 22, 1951 (C.M. 226).

2. Said court erred in overruling said motion of said plaintiffs in error for a new trial, filed in said court May 21, 1951, (C.M. 206) by order entered May 22, 1951 (C.M. 226).

3. Said court erred in overruling supplemental motion for new trial of said plaintiffs in error filed May 24, 1951 (C.M. 229) by order entered May 24, 1951 (C.M. 233).

4. Said court erred in denying said plaintiffs in error the right to prepare and present suggested findings of fact and conclusions of law (C.M. 84).

5. Said court erred in rendering judgment terminating, or forfeiting the contracts of employment between the said plaintiffs in error and the Board of Regents for Oklahoma Agricultural Colleges (Journal Entry 6th at C.M. 240 and 245).

[fol. 4] 6. Said court erred in enjoining the Board of Regents of Oklahoma Agricultural Colleges from paying said plaintiffs in error for services rendered said Board of Regents (C.M. 240 and 245).

7. Said court erred in refusing to grant said plaintiffs' in error petition for a mandatory injunction requiring said Board of Regents and said A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, to make payments to said plaintiffs in error of their compensation due under said contracts of employment.

7a. That the errors assigned under 5, 6 and 7 above constitute error in that the judgment of said court in these respects is declared to be authorized in said judgment by

House Bill No. 8 of the 23rd Oklahoma Legislature, which House Bill No. 8, as applied to said plaintiffs in error by the judgment of said court, violates the constitutional rights of said plaintiffs in error under the following provisions of the Oklahoma Constitution, in that House Bill No. 8, enacted by the 23rd Oklahoma Legislature, and signed by the governor of the State of Oklahoma April 9, 1951, each section thereof, [fol. 5] the Oath set forth in Section 2 thereof, and each word, phrase, clause, sentence or other portion of said Oath constitutes a purported effort by the Legislature of the State of Oklahoma to govern Oklahoma Agricultural and Mechanical College enacted in violation of Article VI, section 31a, reposing in said Board of Regents the exclusive power to govern said college; and

Constitutes a Bill of attainder and ex post facto law, and a law impairing the obligations of contracts enacted in violation of Article II, Section 2, prohibiting the passing of any Bill of Attainder, ex post facto law, or law impairing the obligations of contracts; and

Constitutes the deprivation of liberty and property of said plaintiffs in error without due process of law in violation of Article II, Section 7; and

Constitutes an unlawful delegation of legislative authority to the government of the United States and to an agency and an official thereof in violation of Article V, Section 1, vesting legislative authority in the State Legislature; and

Constitutes the requirement of a religious test for the exercise of civil and political rights in violation of article I, Section 2, prohibiting such test; and

[fol. 6] Constitutes the inclusion of a subject in said House Bill not expressed in the title thereof, insofar as it effects a forfeiture of office or employment in violation of Article V, Section 57; and

Constitutes the exercise of a judicial function by the State Legislature in declaring a forfeiture of office or employment in violation of Article IV providing that neither branch of the government shall exercise the powers properly belonging to either of the other, and in each such respects violates the rights of said plaintiffs in error under said contract of employment, protected by each of said constitutional provisions; and violates the constitutional rights of said plain-

tiffs in error under the following provisions of the Constitution of the United States:

(a) Article I, Section 8, providing that Congress shall have the power to raise and support armies, to provide and maintain a navy, to make rules for the government and the regulation of the land and naval forces; to organize, arm and discipline the militia; [fol. 7] (that the Congress of the United States of America, prior to the effective date of the Act, did not consent that the State of Oklahoma exercise any of said powers constitutionally delegated to the Congress but did enact a comprehensive, complete and fully integrated legislative scheme in the exercise of each and all of such powers; that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, constitutes a purported attempt to exercise such powers so delegated and now exercised by the Congress of the United States of America);

(b) Article I, Section 10, providing that no state shall pass any Bill of Attainder or any law impairing the obligation of contracts; (that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, impairs the obligations of said contracts of employment and constitutes a Bill of attainder as to said plaintiffs in error);

[fol. 8] (c) Article VI, Section 1, providing that the Constitution and laws of the United States of America which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States of America shall be the supreme law of the land; (that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, violates the constitution and laws of the United States of America in the particulars heretofore and hereafter enumerated, and is in violation of treaties made under the authority of the United States of America including the treaty effecting the membership of the United States of America in the United Nations Organization);

(d) The Fourteenth Amendment of the Constitution of the United States of America providing that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; [fol. 9] (e) Article II, Section 8, delegating to the Congress the power to regulate commerce with foreign nations;

in that House Bill No. 8 enacted by the 23rd Oklahoma Legislature, and signed by the Governor of the State of Oklahoma April 9, 1951, each section thereof, the Oath set forth in section 2 thereof, and each word, phrase, clause, sentence, or other portion of said Oath, violates each and all of the said constitutional provisions hereinabove referred to, and violates the rights of plaintiffs in error under said contracts of employment, protected by each of said constitutional provisions.

8. Said court erred in terminating said contracts of employment and in preventing said payment of compensation thereunder when said court in the same judgment in which such denial occurred extended to others in the same class of said plaintiffs in error other and additional protection for their contracts of employment and their rights to receive compensation thereunder as set forth in the 4th, 5th, 8th, [fol. 10] 13th and 14th paragraphs of said judgment (C. M. 238, 239, 240, 244 and 245 resp.), hereinafter set forth in paragraphs 13, 14, 17, 22 and 23 respectively.

9. The court erred in its findings of fact because such findings do not include relevant and material facts proved by competent evidence, agreements and stipulations in this case.

10. The court erred in concluding that said plaintiffs in error willfully refused to take the oath in that the competent evidence in this case shows that such refusal was not willful and in that whether or not the refusal was willful is a question of fact, which question of fact was not proved in this case.

11. Said court erred in rendering judgment concluding that said plaintiffs in error willfully refused to take the oath and in rendering judgment terminating said contracts of employment and enjoining the payment of compensation due

thereunder (Journal Entry 6th, C. M. 240), when in the same judgment said court afforded protection to others in the same class was plaintiffs in error not taking the oath by the 4th, 5th, 8th, 13th and 14th parts of said judgment [fol. 11] (C. M. 238, 239, 240, 244, and 245 resp.), thus denying to plaintiffs in error the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

In making the following conclusions and in rendering judgment thereupon, said court erred for the reason that each of the following conclusions, and the judgment rendered thereupon, having purportedly been authorized by the provisions of House Bill No. 8 of the 23rd Oklahoma Legislature, is contrary to law, and violates each and all of the provisions of the Constitution of the State of Oklahoma, hereinabove set forth, and the provisions of the Constitution of the United States, hereinabove set forth.

12. Said court erred in concluding and rendering judgment that: "the teachers, professors, and other employees of the defendant, Board of Regents, may be paid from State funds for the first nine days of May, 1951; and it is so ordered." (C. M. 238, 3rd.)

[fol. 12] 13. Said court erred in concluding and rendering judgment that: "each teacher, professor and employee who has wil-fully or negligently failed to take and subscribe to the oath, as provided in Section 2, Enrolled House Bill No. 8, by midnight May 9, 1951, cannot be paid from State funds, after midnight May 9th, 1951, and concludes that any teacher, professor and employee absent from the State May 9th, 1951, on authorized leave, may be paid regularly and as provided by law during the time of any such absence on authorized leave, and up to and including thirty (30) days after terminating such leave, and up to and returning to work or to the duties of the office or employment of such person; and thereafter in usual and proper form, provided that such person has, during such thirty-day period after returning from said leave, taken said oath in manner and form as prescribed by law, unless an honest mistake or clerical error has been made in any oath that might have [fol. 13] been filed, in which event a correction may be made or an amended oath filed, to clearly set it out; it is so ordered." (C. M. 239, 4th.)

14. Said court erred in concluding and rendering judgment that: "each teacher, professor, and employee who has taken and subscribed to an oath by midnight May 9, 1951, and filed it with the officer, agency, authority, department, commission, or institution in and for which the person executing the oath or affirmation is employed or appointed or to which said person is elected, and which oath taken and subscribed is not the oath provided in Section 2 of the Act, cannot take and subscribe to a new oath, unless an honest mistake or clerical error has been made in the preparation of the oath signed; that such teacher, professor and employee who fails to take and subscribe to the oath or affirmation required in said Act has forfeited his or her right to receive pay; it is so ordered." (C. M. 239, 5th.)

[fol. 14] 15. Said court erred in concluding and rendering judgment that: "the intervenors, and each of them, did not take and subscribe to the oath as provided in section 2 of the Act and wil fully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered." (C. M. 240, 6th.)

16. Said court erred in concluding and rendering judgment that: "the words 'if necessary', following the phrase, 'I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary', means that the Congress of the United States within the powers granted them under the Constitution of the United States and the various selective laws passed by the Congress, will determine when and if it is necessary for any person taking and subscribing to the oath in this Act to bear arms; that such proviso is constitutional. It is so ordered." (C. M. 240, 7th.)

[fol. 15] 17. Said court erred in concluding and rendering judgment that: "non-citizens of the United States employed by the State must take and subscribe to the oath as provided in the Act, and that the words, 'if necessary' following the phrase, 'I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary', as applied to them does not violate any of the constitutional rights guaranteed them under the Fourteenth Amendment, or other Constitutional or statutory provisions of the United States, or the Constitution or any

statutory provisions of the State of Oklahoma, nor does it violate any treaty agreement with other nations or between the signers of the United Nations. The Congress of the United States, in various selective service, if any, the nationals of other countries must render, taking into consideration the treaty agreements with each country and between the United Nations. It is so ordered." (C. M. 241, 8th.)

18. Said court erred in concluding and rendering judgment that: "that portion of the said oath which requires the teachers, professors and employees of the defendant [fol. 16] Board of Regents, including these intervenors, to state:

> 'I am not affiliated directly or indirectly • • • with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; • • •'

and to further state:

> 'that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member • • • of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization,'

are valid provisions of the law. • • • that said provisions are constitutional in all respects and are applicable to any such organization which prior to April 9, 1951, has [fol. 17] been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization, and the words 'officially determined' mean such listed organizations as have been afforded an opportunity to present their case; Joint Anti-Fascist Refugee Committee, Petitioner, v. J. Howard McGrath, Attorney General of the United States, et al. (decided by the Supreme Court of the United States April 31, 1951), and it was the express inten-

tions of the legislature, by the words 'has been' to mean only those organizations found to be subversive prior to the effective date of the Act, to-wit: April 9, 1951, and does not apply to any organization declared to be subversive after April 9, 1951, and the Court concludes that the legislature may adopt by reference any report or lists of the United States Attorney General or other authorized agency of the United States wherein it has been officially determined that any organization is a communist front or other subversive organization. It is so ordered." (C. M. [fol. 18] 241, 242, 243, 9th.)

19. Said court erred in concluding and rendering judgment that: "the legislature had the right, within the 'police power', to enact legislation affecting the vital welfare of the State and Nation, and that Enrolled House Bill No. 8 passed by the Twenty-third Legislature does not impair the obligation of contracts; it is so ordered." (C. M. 243, 10th.)

20. Said court erred in concluding and rendering judgment that: "the court does hereby take judicial notice of the threat to our liberties and way of life, and that prior to the passage of this Act a person could obtain a job in our colleges, universities and public schools without declaring his loyalty to his employer, the people of the State of Oklahoma, and of the stress of the times and the need for protection from our enemies, foreign and domestic, and of the advocacy of persons, groups and organizations to overthrow our government by force and violence; and that the [fol. 19] legislature of Oklahoma, in the exercise of its police powers, has wide discretion in determining what is necessary, as an exercise of police power, to protect the general welfare of its people, and so far as constitutional issue is concerned the powers of the State, when otherwise justified, is not diminished because of a private contract which may be affected. All contractual obligations between the Board of Regents and teachers, professors and employees, including the intervenors, are subject to Enrolled House Bill No. 8 of the Twenty-third Legislature; it is so ordered.

" * * that in the event the Board of Regents found that an honest mistake has been made in the oath so filed,

in the name, designation of the position held, or any other clerical error, that said error may be corrected by the taking of a new oath." (C. M. 243, 244, 11th)

21. Said court erred in concluding and rendering judgment that: "the injunction should be made permanent in [fol. 20] all things as prayed in plaintiff's petition; it is so ordered." (C. M. 244, 12th)

22. Said court erred in concluding and rendering judgment that: "there may be clipped to the original oath a statement of a non-citizen, if he so desires, the following statement:

'I further state that I am a citizen, or subject, of ——, and that I have taken the foregoing oath, subject to my allegiance to, and rights and obligations, as a citizen, or subject, of ——.

Dated this — day of ——, 1951.'

And upon timely filing thereof, his rights to receive compensation shall not be prejudiced." (C. M. 244, 245, 13th)

23. Said court erred in concluding and rendering judgment that: "In view of the findings and judgment of this Court, this 21st day of May, 1951, made in this litigation [fol. 21] and this hearing, to the effect that non-nationals may be permitted to execute an additional and explanatory statement along with their oath of allegiance, the court now finds and concludes that all non-nationals who have heretofore, because of misunderstanding or honest mistake, have failed, up to this time, to execute the oath in the manner and form as provided herein, together with the explanatory statement, as provided herein, that all such non-nationals may have a reasonable time after the execution of this judgment, this date, by the Court, within which to properly prepare, take and file said oath, not to exceed 10 days; and it is so ordered." (C. M. 245, 14th)

24. Said court erred in concluding and rendering judgment as follows: "It is therefore ordered, adjudged and decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunc- [fol. 22] tion is in all things denied, and costs are assessed against the defendants and the intervenors." (C. M. 245)

25. Said court erred in rendering judgment for defendants in error (C. M. 235 to 245, inclusive).

Wherefore, plaintiffs in error, Robert M. Wieman and Nancy Kent Ziebur, pray that said judgment and each part thereof so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of said plaintiffs in error, and that said plaintiffs in error be restored to all rights that he has lost by the rendition of such judgment and each part thereof, and that judgment be rendered for said plaintiffs in error directing the Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of [fol. 23] Oklahoma, directing them to pay to said plaintiffs in error the sums due under the contract between the said Board of Regents and plaintiffs in error up to and including the end of the current fiscal year, and for such other relief as to the Court may seem just.

Robert M. Wieman and Nancy Kent Ziebur, Plaintiffs in Error, by Robert J. Emery, Don Emery, Their Attorneys.

of Oklahoma to the Government of the United States of America and to an executive office thereof;

(e) Article 1, Section 2, providing that no religious test [fol. 51] shall ever be required for the exercise of civil and political rights; that the Act and each section thereof, the Oath and each word, phrase, clause, sentence or other portion thereof, constitutes a religious test as a requirement for the exercise of civil and political rights;

(f) Article V, Section 57, providing that every act of the Legislature shall embrace but one subject; that if any subject be embraced in any act contrary to the provisions of this Section, such act shall be void only as to so much of the law as may not be expressed in the title thereof; that the Act and each section thereof, the Oath and each word, phrase, clause, sentence or other portion thereof, embraces several subjects not expressed in the title of House Bill No. 8, including the forfeiture of office or employment in Section 1 thereof;

(g) Article IV providing that the Legislative Executive and Judicial powers shall be separate and distinct and neither shall exercise the powers properly belonging to either of the other; that the Act and each section thereof, the Oath and each word, phrase, clause, sentence, or other portion thereof, constitutes the exercise of a judicial function, including the purported effort to declare a forfeiture of office or employment;

That the Act and each section thereof, the Oath and each [fol. 52] word, phrase, clause, sentence or other portion thereof, violates the following provisions of the Constitution of the United States of America:

(a) Article I, Section 8, providing that Congress shall have the power to raise and support armies, to provide and maintain a navy, to make the rules for the government and the regulation of the land and naval forces; to organize, arm and discipline the militia;

That the Congress of the United States of America, prior to the effective date of the Act, did not consent that the State of Oklahoma exercise any of said powers constitutionally delegated to the Congress but did enact a comprehensive, complete and fully integrated legislative scheme in the exercise of each and all of such powers; that said Act and each

section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, constitutes a purported attempt to exercise such powers so delegated and now exercised by the Congress of the United States of America;

(b) Article I, Section 10, providing that no state shall impair the obligations of contracts; that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, impairs the obligations of each intervenor's contract;

(c) Article VI, Section 1, providing that the Constitution and laws of the United States of America which shall be made in pursuance thereof, and all treaties made, or which [fol. 53] shall be made, under the authority of the United States of America shall be the Supreme law of the land; that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, violates the Constitution and laws of the United States of America in the particulars heretofore and hereafter enumerated, and is in violation of treaties made under the authority of the United States of America, including the treaty affecting the membership of the United States of America in the United Nations Organizations;

(d) The Fourteenth Amendment of the Constitution of the United States of America providing that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, deprives each intervenor of life, liberty, and property without due process of law, and denies to each intervenor the equal protection of the laws, in that countless officers of the state, county, school district, municipality, public agency, public authority, and public district are constitutionally immune under the Constitution of the State of Oklahoma, from the requirements of said House Bill No. 8, which immunity renders the statutory compulsion upon each intervenor to take the Oath a denial [fol. 54] of the equal protection of the laws to each intervenor; and denies to each intervenor the equal protection of the laws in various other respects;

And intervenors further allege, and each intervenor alleges, in reference to his contract of employment, indepen-

oath filed, to clearly set it out; it is so ordered." (C.M. 239, 4th.)

14. Said court erred in concluding and rendering judgment that: "each teacher, professor, and employee who has taken and subscribed to an oath by midnight May 9, 1951, [fol. 33] and filed it with the officer, agency, authority, department, commission, or institution in and for which the person executing the oath or affirmation is employed or appointed or to which said person executing the oath or affirmation is employed or appointed or to which said person is elected, and which oath taken and subscribed to is not the oath provided in Section 2 of the Act, cannot take and subscribe to a new oath, unless an honest mistake or clerical error has been made in the preparation of the oath signed; that such teacher, professor and employee who fails to take and subscribe to the oath or affirmation required in said Act has forfeited his or her right to receive pay; it is so ordered." (C.M. 239, 5th.)

15. Said court erred in concluding and rendering judgment that: "The intervenors, and each of them, did not take and subscribe to the oath as provided in section 2 of the Act and wilfully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered." (C.M. 240, 6th.)

16. Said court erred in concluding and rendering judgment that: "the words 'if necessary', following the phrase, 'I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary', means that the Congress of the United States within the powers granted them under the Constitution of the United States and the various selective laws passed by the Congress, will [fol. 34] determine when and if it is necessary for any person taking and subscribing to the oath in this Act to bear arms; that such proviso is constitutional. It is so ordered." (C.M. 240, 7th.)

17. Said court erred in concluding and rendering judgment that: "non-citizens of the United States employed by the State must take and subscribe to the oath as provided in the Act, and that the words, 'if necessary' following the phrase, 'I will take up arms in the defense of the United

States in time of War, or National Emergency, if necessary', as applied to them does not violate any of the constitutional rights guaranteed them under the Fourteenth Amendment, or other Constitutional or statutory provisions of the United States, or the Constitution or any statutory provisions of the State of Oklahoma, nor does it violate any treaty agreement with other nations or between the signers of the United Nations. The Congress of the United States, in various selective service, if any, the nationals of other countries must render, taking into consideration the treaty agreements with each country and between the United Nations. It is so ordered." (C.M. 241, 8th.)

18. Said court erred in concluding and rendering judgment that: "that portion of the said oath which requires the teachers, professors and employees of the defendant Board of Regents, including these intervenors, to state:

> 'I am not affiliated directly or indirectly * * * with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized [fol. 35] agency of the United States to be a communist front or subversive organization; * * *'

and to further state:

> 'that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member * * * of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization,'

are valid provisions of the law. * * * that said provisions are constitutional in all respects and are applicable to any such organization which prior to April 9, 1951, has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization, and the words 'officially determined' mean such listed organizations as have been afforded an opportunity to present their case; Joint Anti-Fascist Refugee Committee, Petitioner, v. J.

Howard McGrath, Attorney General of the United States, et al. (decided by the Supreme Court of the United States April 31, 1951), and it was the express intention of the legislature, by the words 'has been' to mean only those organizations found to be subversive prior to the effective date of the Act, to-wit: April 9, 1951, and does not apply to any organization declared to be subversive after April 9, 1951, and the Court concludes that the legislature may adopt by reference any report or lists of the United States Attorney [fol. 36] General or other authorized agency of the United States wherein it has been officially determined that any organization is a communist front or other subversive organization. It is so ordered." (C.M. 241, 242, 243, 9th.)

19. Said court erred in concluding and rendering judgment that: "the legislature had the right, within the 'police power' to enact legislation affecting the vital welfare of the State and Nation, and that Enrolled House Bill No. 8 passed by the Twenty-third Legislature does not impair the obligation of contracts; it is so ordered." (C.M. 243, 10th.)

20. Said court erred in concluding and rendering judgment that: "the court does hereby take judicial notice of the threat to our liberties and way of life, and that prior to the passage of this Act a person could obtain a job in our colleges, universities and public schools without declaring his loyalty to his employer, the people of the State of Oklahoma, and of the stress of the times and the need for protection from our enemies, foreign and domestic, and of the advocacy of persons, groups and organizations to overthrow our government by force and violence; and that the legislature of Oklahoma, in the exercise of its police powers, has wide discretion in determining what is necessary, as an exercise of police power, to protect the general welfare of its people, and so far as constitutional issue is concerned the powers of the State, when otherwise justified, is not diminished because of a private contract which may be [fol. 37] affected. All contractural obligations between the Board of Regents and teachers, professors and employers, including the intervenors, are subject to Enrolled House Bill No. 8 of the Twenty-Third Legislature; it is so ordered. "* * * that in the event the Board of Regents found that an honest mistake has been made in the oath so filed,

in the name, designation of the position held, or any other clerical error, that said error may be corrected by the taking of a new oath." (C.M. 243, 244, 11th)

21. Said court erred in concluding and rendering judgment that: "the injunction should be made permanent in all things as prayed in plaintiffs petition; it is so ordered." (C. M. 244, 12th)

22. Said court erred in concluding and rendering judgment that: "there may be clipped to the original oath a statement of a non-citizen, if he so desires, the following statement:

> 'I further state that I am a citizen, or subject, of ——, and that I have taken the foregoing oath, subject to my allegiance to, and rights and obligations, as a citizen, or subject, of ——.
>
> Dated this — day of —— 1951.'

And upon timely filing thereof, his rights to receive compensation shall not be prejudiced." (C.M. 244, 245, 13th)

23. Said court erred in concluding and rendering judgment that: "In view of the findings and judgment of this [fol. 38] Court, this 21st day of May, 1951, made in this litigation and this hearing, to the effect that non-nationals may be permitted to execute an additional and explanatory statement along with their oath of allegiance, the court now finds and concludes that all non-nationals who have heretofore, because of misunderstanding or honest mistake, have failed, up to this time, to execute the oath in the manner and form as provided herein, together with the explanatory statement, as provided herein, that all such non-nationals may have a reasonable time after the execution of this judgment, this date, by the Court, within which to properly prepare, take and file said oath, not to exceed 10 days; and it is so ordered." (C. M. 245, 14th)

24. Said court erred in concluding and rendering judgment as follows: "It Is Therefore Ordered, Adjudged and Decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the deffendants and the intervenors." (C. M. 245)

25. Said court erred in rendering judgment for defendants in error (C.M. 235 to 245, inclusive).

Wherefore, plaintiffs in error, Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz, pray that said judgment and each part thereof so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of said [fol. 39] plaintiffs in error, and that said plaintiffs in error be restored to all rights that he has lost by the rendition of such judgment and each part thereof, and that judgment be rendered for said plaintiffs in error directing the Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, directing them to pay to said plaintiffs in error the sums due under the contract between the said Board of Regents and plaintiffs in error up to and including the end of the current fiscal year, and for such other relief as to the Court may seem just.

Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz, Plaintiffs in error, By Robert J. Emery (Signed), Don Emery (Signed), Their Attorneys.

[fol. 40] IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

Case No. 125,417

PAUL W. UPDEGRAFF, Plaintiff,

vs.

THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, Defendants

PETITION—Filed May 9, 1951

Comes now the plaintiff and for cause of action against the defendants alleges and states:

1. That he is a tax payer and citizen of the State of Oklahoma.

2. That the defendant, the Board of Regents of the Oklahoma Agricultural Colleges, has charge of all monies appropriated by the State Legislature of the State of Oklahoma and the power and authority to expend all funds appropriated by the legislature or by Congress for said colleges.

3. That A. S. J. Shaw, defendant herein, is the State Treasurer of the State of Oklahoma.

4. That the defendant, Wilburn C. Cartwright, is the State Auditor of the State of Oklahoma.

5. That the 1951 legislature of the State of Oklahoma passed a bill known as the "loyalty oath" wherein it is provided that any person employed by the State of Okla- [fol. 41] homa, before receiving any monies from the State Treasurer, shall subscribe to a "loyalty oath."

6. That the defendant the Board of Regents of the Oklahoma Agricultural Colleges, have in their employ certain teachers, professors, and other employees, some of whom are citizens of the State of Oklahoma and others are visiting professors from other countries and are non-citizens of the United States, who have refused, failed and neglected to subscribe to the oath as provided by law, and the said persons who have failed to subscribe to the oath, on or about the 9th day of May, 1951, will prepare and file a salary claim for the month of May, 1951.

7. That by reason of their failure to subscribe to the said loyalty oath, each employee failing to so subscribe and file the same with the head of their respective institution is not entitled to be paid from state funds for the month of May, 1951. That plaintiff has no adequate remedy at law.

Wherefore plaintiff prays judgment against the defendants, the Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, perpetually enjoining and restraining them from paying any of the employees of the Oklahoma Agricultural Colleges for the month of May, 1951, or any other month until such period of time as each employee paid has subscribed to the oath as provided in En- [fols. 42-43] rolled House Bill No. 8 passed by the Twenty-third Legislature, and that the defendants hereinabove

named shall be enjoined from paying salaries or reimbursement for expenses incurred by any teacher, proffessor and other employees; and that the defendants herein named or institution, in and for which the person executing the oath or affirmation is employed or appointed or elected, shall be enjoined from accepting after midnight May 9, 1951, any oaths other than the oaths such teachers, professors and other employees may have filed with the proper head or public authority for said institution, provided that the teachers, professors and other employees who are on authorized leave on May 9th, 1951, may take and subscribe said oath or affirmation by midnight June 8, 1951.

(S.) Paul W. Updegraff, Attorney for Plaintiff.

Duly sworn to by Paul W. Updegraff. Jurat omitted in printing.

[fol. 44] In District Court of Oklahoma County

[Title omitted]

Order Granting Intervenors Permission to File Consolidated Petition—Filed May 19, 1951

This matter coming on to be heard this 18th day of May, 1951, one of the regular days of the January Term of the District Court of Oklahoma County, before the Honorable [fol. 45] W. A. Carlile, Judge of said court, upon the intervenors' motion to file a consolidated petition in intervention and cross action, which is to be the petition in intervention and cross action of all intervenors above named, superceding and being in substitution for the separate petitions of each intervenor heretofore filed by permission of this court.

It is, therefore, ordered, adjudged and decreed by this court that leave be granted the above named intervenors to file their consolidated petition in intervention and cross action in substitution for and supersession of the petition in intervention and cross action filed by each of said intervenors heretofore by order of this court; that leave be granted to each intervenor to withdraw his separate petition.

W. A. Carlile, District Judge.

[fol. 46] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

CONSOLIDATED PETITION IN INTERVENTION—Filed May 19, 1951

Comes now Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz (hereinafter called "intervenors", and each of them, having been made a party herein by order of this court, for answer to plaintiff's petition alleges and states:

That each intervenor is a citizen and subject of the United States of America and of the State of Oklahoma, a resident of Payne County, Oklahoma, and is now serving Oklahoma Agricultural and Mechanical College as follows: Intervenor Wieman is Assistant Professor of Philosophy; Intervenor Ziebur is Research Assistant for Research Foundation; [fol. 47] Intervenor Baum is Assistant Professor of Botany; Intervenor Lee is Associate Professor of Chemistry; Intervenor Correll is Professor of Physics and Chairman of Physical Science; Intervenor Schmoe is a Secretary, and Intervenor Nietz is Assistant Professor of Music, each under a valid contract of employment with the defendant Board of Regents and with the Oklahoma Agricultural and Mechanical College, for a term commencing at a time prior to the effective date of an Act enrolled as House Bill No. 8, and passed by the 23rd Oklahoma Legislature; that said contract extends, according to its term, at least to the end of the current fiscal year; that "Part H—Text of Policy Statement," dated April, 1945, pages 5 to 9 inclusive, and adopted by defendant Board of Regents in April, 1946, is a part of said contract of employment; that by the terms thereof each intervenor is entitled to receive, in monthly payments, from funds that are now lawfully available an annual salary as follows: Intervenor Wieman, $3600.00; Intervenor Ziebur, $900.00; Intervenor Baum, $3600.00; Intervenor Lee, $4200.00; Intervenor Correll, $6000.00; Intervenor Schmoe, $1610.00; and Intervenor Nietz, $3000.00; that funds are lawfully available to meet the salary obligations of each of said contracts; that each intervenor has in all things com-

plied with said contract, and has done all things required by law in the performance thereof, and required by law as a condition precedent and as a condition subsequent to the right to receive compensation thereunder; that said contract [fol. 48] does not require intervenor to take any oath of any kind or to do anything mandated by "the oath" hereinafter referred to, or to refrain from doing anything proscribed by said Oath; that each intervenor has heretofore received payments monthly thereunder up to and including the month of April, 1951; that each intervenor is now ready, able and willing to perform, and is now performing, and will continue to perform services thereunder during the term thereof without interference from the defendant Board of Regents, or from any of its authorized agents; that this intervenor is entitled to receive payments thereunder and is entitled to have defendant Board of Regents direct its authorized agent, and to have the defendant, A. S. J. Shaw, as State Treasurer of the State of Oklahoma, and to the defendant, Wilburn C. Cartwright as State Auditor of the State of Oklahoma, to do any and all things lawfully necessary to be done to effect payment thereunder to this intervenor; and to each intervenor;

That each intervenor is not a member of any organization, political or otherwise, that advocates, that he has not and will not advocate, the overthrow of the Government of the United States of America or of the State of Oklahoma, by force or violence, or unlawful means;

That an Act (hereinafter referred to as "the Act") passed by the 23rd Oklahoma Legislature, enrolled as House Bill No. 8, and approved by the Governor of the State of [fol. 49] Oklahoma on the 9th day of April, 1951, is unconstitutional and void as to each intervenor in that it violates each intervenor's rights protected by the Constitution of the State of Oklahoma, and violates each intervenor's rights protected by the Constitution of the United States of America in the following ways and in the following particulars:

That the Act, and each section thereof, to-wit: Section 1 requiring each intervenor to take the Oath set forth in Section 2 (hereinafter called "the Oath"), and declaring a forfeiture of office or employment for failure to take the

Oath; Section 2 providing for the Oath; Section 3 constituting a prescription for filing the Oath; Section 4 declaring who may take the Oath; Section 5 prohibiting compensation and reimbursement for expenses to each intervenor and prohibiting the inclusion of his name on the public payrolls unless he takes and files the Oath; Section 6 denoting the taking of a false oath as the crime of perjury; Section 7 declaring the Oath taker to be guilty of a felony if, after taking the Oath, he is guilty of certain conduct proscribed by the Oath; Section 9 rendering each cognizable part of the Oath severable; and Section 10 declaring the existence of an emergency, are unconstitutional and void as to each intervenor because the Act and each section thereof, the Oath and each word, phrase, clause, sentence, or other portion thereof, violates the following provisions of the Constitution of the State of Oklahoma:

(a) Article VI, Sec. 31a, reposing in the constitutionally created Board of Regents the exclusive power to govern [fol. 50] Oklahoma Agricultural and Mechanical College; that the Act and each section thereof, the Oath and each word, phrase, clause, sentence, or other portion thereof, constitutes a purported attempt to govern said college;

(b) Article II, Section 15, prohibiting the passing of any bill of attainder, ex post facto law, or law impairing the obligations of contracts; that the Act and each section thereof, the Oath and each word, phrase, clause, sentence, or other portion thereof, constitutes a bill of attainder and ex post facto law, and a law impairing the obligation of contracts;

(c) Article II, Section 7, providing that no person shall be deprived of life, liberty or property without due process of law; that said Act and each section thereof, the Oath and each word, phrase, clause, sentence or other portion thereof, constitutes the taking of life, liberty and property without due process of law;

(d) Article V, Section 1, providing that the legislative authority of this State shall be vested in a legislature; that the Act and each section thereof, the Oath and each word, phrase, clause, sentence or other portion thereof, constitutes an unlawful delegation of the legislative power of the State

dently thereof and as a part and parcel thereof, that, by the uniform custom, policy and practice of the said defendants, Board of Regents of the Oklahoma Agricultural Colleges, and by the implied understanding and agreement between each intervenor and the said defendants, it is contemplated that each intervenor will be retained in the service of said defendants and his employment will be renewed from time to time at the expiration of each term thereof so long as there is need of the services rendered by each intervenor at the said Oklahoma Agricultural and Mechanical College, and so long as each intervenor renders efficient and faithful service and demeans himself in a sober, honest and upright manner; that the said Act, and the requirements thereof, if interpreted and applied in accordance with plaintiff's allegations herein, constitutes an unconstitutional interference in respect of each claim of unconstitutionality hereinabove alleged, and constitute an unconstitutional interference with the right of defendant Board of Regents to continue said custom, policy and practice in the exercise of their constitutional authority to govern and manage the said College, and of each intervenor to have the said Board of Regents free to continue said custom, policy and practice and, in pursuance [fol. 55] thereof, to continue each intervenor in his present position and employment without regard to considerations other than the proper and efficient functioning of said College as an educational institution and for the accomplishment of the functions for which it was created; that each intervenor is entitled to have the said defendant Board of Regents free to continue said custom, policy and practice and, in the exercise of their legal and constitutional discretion, free to continue and to renew his said employment, without hindrance or control by the said unconstitutional provisions of said statute and without interference by the refusal of said other defendants, A. S. J. Shaw and Wilburn Cartwright, to perform their officials duties in respect to the employment of each intervenor so long as said employment shall be continued by said defendant Board of Regents.

That intervenor has not taken the Oath; that each intervenor, except Ziebur and Wieman, conscientiously and sincerely believes that war and the use of force between nations is contrary to the Will of God, and is forbidden by divine

law, and that in obedience to these principles, and as a matter of religious faith and obligation, each intervenor, except Ziebur and Wieman, cannot and will not, because of his aforesaid religious convictions, bear arms against his fellowman;

That, because of the constitutional defects hereinabove [fol. 56] enumerated, the requirement of said Oath, and the statutory provisions designed to implement and enforce it, are inapplicable and ineffective as to so many state officers and employees as to render unattainable the manifest legislative intent, specifically set out in the title to said Act, to establish the Oath and compliance with the Act as a uniformly effective and uniformly binding obligation to be exacted from all state officers and employees, wherefore the provisions as to severability contained in Section 9 of the Act are without meaning, force or effect, and are unenforcible and void so that the Oath and all other provisions of said Act cannot be imposed upon or made effective against any state officer or employee and particularly not against each intervenor;

Wherefore, premises considered, intervenors, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz, and each of them, pray judgment against the plaintiff denying plaintiff each and every form of relief prayed [fol. 57] for in his petition; that the temporary restraining order granted against the defendants, the Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, be dissolved; that a temporary injunction and permanent injunction against each of said defendants be denied; that each intervenor have all other relief, including any extraordinary writs necessary to protect his constitutional rights hereinabove alleged to be violated.

Emery & Emery, by Robert J. Emery, Don Emery,
Attorneys for Intervenors.

Duly sworn to by Robert M. Wieman et al. Jurats omitted in printing.

[fol. 58] IN DISTRICT COURT OF OKLAHOMA COUNTY

CROSS PETITION OF INTERVENORS, ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, SAMUEL HUNT LEE, MALCOLM CORRELL, LILLIAN A. SCHMOE, AND LUELLA R. NIETZ —May 19, 1951

Comes now Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz, intervenors herein, and each of them, for his cross petition against each of the defendants, the Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, adopts and repleads each and every allegation hereinabove set forth in intervenors' petition in intervention, to the same effect as though it were fully and completely set forth herein.

Intervenors, and each of them, further allege that, by the uniform custom, policy and practice of the said defendants, Board of Regents of the Oklahoma Agricultural Colleges, and by the implied understanding and agreement between each intervenor and said defendants, it is contemplated that each intervenor will be retained in the service of said defendants and his employment will be renewed from time to time at the expiration of each term thereof so long as there is need of the services rendered by each intervenor at the said Oklahoma Agricultural and Mechanical College, and so long as each intervenor renders efficient and faithful service and demeans himself in a sober, honest and upright manner; [fol. 59] that the said Act, and the requirements thereof, if interpreted and applied in accordance with plaintiff's allegations herein constitute an unconstitutional interference with the right of defendant Board of Regents to continue said custom, policy and practice in the exercise of their constitutional authority to govern and manage the said College, and of each intervenor to have the said Board of Regents free to continue said custom, policy and practice and, in pursuance thereof, to continue each intervenor in his present position and employment without regard to considerations other than the proper and efficient functioning of said College as an educational institution and for the

accomplishment of the functions for which it was created; that each intervenor is entitled to have the said defendant Board of Regents free to continue said custom, policy and practice and, in the exercise of their legal and constitutional discretion, free to continue and to renew his said employment, without hindrance or control by the said unconstitutional provisions of said statute and without interference by the refusal of said other defendants, A. S. J. Shaw and Wilburn C. Cartwright, to perform their official duties in respect to the employment of each intervenor so long as said employment shall be continued by said defendant Board of Regents.

Wherefore, premises considered, said intervenors, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz, and each of them, being otherwise remediless, praus this Honorable Court to issue a writ of mandamus, or if not entitled to mandamus, then a mandatory injunction, requiring and compelling said defendants, and each of them the Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, to comply with its or his, statutory duty in the premises without regard to the provisions of House [fol. 60] Bill No. 8, passed by the 23rd Legislature of the State of Oklahoma, to certify each intervenor's name on the proper public payrolls, and to do all things necessary to effect payment to each intervenor under his contract with said defendant, the Board of Regents of the Oklahoma Agricultural Colleges, which is the Board of Regents for Oklahoma Agricultural and Mechanical College, and for such other and further relief as may be just and proper in the premises.

Emery & Emery, by Robert J. Emery, Don Emery,
Attorneys for Intervenors.

Duly sworn to by Robert M. Wieman et al. Jurats omitted in printing.

[fol. 61] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

ANSWER—Filed May 16, 1951

Come now the above-named defendants, and each of them, and in answer to the petition of plaintiff herein and in response to the "Temporary Restraining Order" issued in this cause, allege and state:

1. That the material allegations of fact set forth in the petition are not sufficient to constitute a cause of action in favor of plaintiff and against defendants.

2. Defendants admit the material allegations of fact set forth in Paragraphs 1 to 6 of plaintiff's petition.

3. That the teachers, professors and other employees referred to in Paragraph 6 of the petition were employed by the defendant, Board of Regents for the Oklahoma Agricultural and Mechanical Colleges, prior to April 9, 1951 (the effective date of the act mentioned in Paragraph 5 of the petition), to teach and otherwise serve in said colleges on a contract basis during the fiscal year ending June 30, [fol. 62] 1951, and hence, by virtue of that part of Section 15, Article 2 of the Oklahoma Constitution which provides that no law

> "impairing the obligation of contracts shall ever be passed,"

the provisions of said Act (House Bill No. 8 of the Twenty-third Oklahoma Legislature) are not applicable to said contracts or to the May, 1951 salary claims mentioned in said petition, and therefore the defendant board, treasurer and auditor should not be enjoined from approving and paying the claims referred to in Paragraph 6 of the petition.

4. That the teachers, professors and other employees referred to in Paragraph 6 of the petition have not been, and cannot lawfully be, employed by the defendant board to teach or otherwise serve in the colleges mentioned in the petition during the fiscal year ending June 30, 1952 or during any succeeding fiscal year, except after the beginning of each such year, hence the prayer for injunctive relief set forth in the petition as to salary claims of said teachers,

professors and other employees for any such future fiscal year, is premature and not susceptible of fulfillment.

Wherefore, premises considered, defendants respectfully ask the court to deny plaintiff the injunctive relief prayed for by him.

Mac Q. Williamson, Attorney General of Oklahoma;
Fred Hansen, First Assistant Attorney General,
Attorneys for Defendants.

Duly sworn to by Harold Hutton. Jurat omitted in printing.

[fol. 63] [File endorsement omitted.]

[fol. 64] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

ANSWER TO CROSS-PETITION OF INTERVENORS—Filed May 16, 1951

Come now the above named defendants, and each of them, and in answer to each of the separate cross petitions of the intervenors, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Lee Hunt, Jr., Malcolm Correll, Lillian A. Schmoe and Luella Nietz, in each of which cross-petitions a writ of mandamus is sought against defendants

> "to certify this intervenor's name on the proper public payrolls, and to do all things necessary to effect payment to this intervenor under his contract with said defendant, the Board of Regents of the Oklahoma Agricultural Colleges, which is the Board of Regents for Oklahoma Agricultural and Mechanical College, and for such other and further relief as may be just and proper in the premises."

and allege and state:

1. That the material allegations of fact set forth in the cross-petition of intervenor are not sufficient to constitute a cause of action in favor of intervenor and against defendants.

[fol. 65] 2. That it is the intention of defendants, and each of them (unless enjoined by this court), to certify, approve and pay the teachers, professors and other employees referred to in Paragraph 6 of the petition of the plaintiff, Paul W. Updegraff (also referred to in Paragraph 3 of defendants' answer to said petition), including intervenor, the compensation due thereto under the contracts referred to in said paragraph (including the above-mentioned contract of intervenor) up to and including June 30, 1951.

Wherefore, premises considered, defendants respectfully ask the court to deny intervenors the issuance of the writ of mandamus prayed for by them.

Mac Q. Williamson, Attorney General of Oklahoma.
Fred Hansen, First Assistant Attorney General,
Attorneys for Defendants.

Duly sworn to by Harold Hutton. Jurat omitted in printing.

[fol. 66] [File endorsement omitted.]

[fol. 67] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

ANSWER TO PLEA OF INTERVENTION—Filed May 19, 1951

Comes now the plaintiff and for answer to the plea of intervention filed herein by the intervenors denies each and every material allegation set forth in the plea of intervention except those hereinafter specifically admitted.

1. Plaintiff states that it is not within his knowledge as to the various reasons given by the various intervenors as to why they did not subscribe to the oath as provided by Enrolled House Bill No. 8 of the Twenty-third Legislature, but specifically denies that the said Act is unconstitutional or violates any of the constitutional rights of the intervenors as provided in the Constitution of the State of Oklahoma and by the Constitution of the United States.

2. Plaintiff specifically denies that Article 6, Section 31(a) creating the Board of Regents to govern Oklahoma

Agricultural and Mechanical Colleges prohibits the legislature from passing Enrolled House Bill No. 8 of the Twenty-third Legislature, and says that said Bill specifically applies [fol. 68] to all teachers, professors and other employees of the institutions under the supervisions and control of the Board of Regents of the Oklahoma Agricultural and Mechanical Colleges for the reason that all salaries or other funds disbursed are being paid from the State treasury of Oklahoma.

3. Plaintiff specifically denies that the Act is unconstitutional and void or impairs any contract of any person holding "tenure" or any other valid contract of employment made by the defendant Board of Regents with the intervenors or any teacher, professor, or other employee.

4. Plaintiff specifically denies that the said Bill violates Article 2, Section 15; Article 2, Section 7; Article 5, Section 1; Article 1, Section 2; Article 2, Section 57; Article 4, all of the Constitution of the State of Oklahoma; Article 1, Section 8; Article 1, Section 10; Article 6, Section 1; the Fourteenth Amendment, all of the Constitution of the United States; any treaty agreements made by the authority of the United States including the treaty affecting the membership of the United States and United Nations organization; or of any other provision of the Constitution of the State of Oklahoma or of the United States.

Wherefore plaintiff prays that the intervenors and each of them shall be denied each and every form of relief prayed for in the petition of intervention (or cross petition of intervenors) and that a permanent injunction be granted against the defendants, the Board of Regents of the Oklahoma Agricultural and Mechanical Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, and that the permanent injunction be granted in all things as prayed for in the petition of this plaintiff.

(S.) Paul W. Updegraff, Plaintiff.

Duly sworn to by Paul W. Updegraff. Jurat omitted in printing.

[fol. 69] [File endorsement omitted.]

[fol. 70] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

REPLY—Filed May 19, 1951

Comes now the plaintiff and for reply to the answer of the defendants and each of them filed herein, and denies each and every material allegation set forth in the answer except those that may be hereinafter specifically admitted.

Plaintiff specifically denies that Enrolled House Bill No. 8 passed by the Twenty-third Legislature impairs the obligations of contracts existing between the Board of Regents for the Oklahoma Agricultural and Mechanical College and teachers, professors, and other employees, and that said Act is applicable to all contracts and to the May, 1951, salary claims, and therefore the defendant Board of Regents, State Treasurer, and State Auditor should be enjoined from approving and paying the said claims.

Plaintiff says that the Act as passed by the legislature is constitutional and valid in all things.

Plaintiff specifically denies that other employees, except teachers and professors, are employed on a basis of the [fol. 71] school term and says they are employed only on the basis of month to month, do not hold any written or oral contract, and may be discharged at any time by the defendant Board of Regents for the Oklahoma Agricultural and Mechanical College or the President of the institution or the heads of departments under whose supervision the employee may work.

Plaintiff specifically denies that the prayer for injunctive relief set forth in the petition as to salary claims for the said teachers, professors and other employees for any future fiscal year is premature, and says that unless the defendants and each of them are enjoined that monies will be paid from the state treasury in direct violation of law.

Wherefore, premises considered, plaintiff respectfully asks this court to grant him permanent injunctive relief as prayed for in his petition.

(S.) Paul W. Updegraff, Plaintiff.

Duly sworn to by Paul W. Updegraff. Jurat omitted in printing.

[fol. 72] [File endorsement omitted.]

[fol. 73] IN DISTRICT COURT OF OKLAHOMA COUNTY

Transcript of hearing to make permanent the temporary injunction—May 19, 1951

Be It Remembered, that this cause came regularly on for hearing on this the 19th day of May, 1951, before the Honorable W. A. Carlile, District Judge in and for Oklahoma County, Oklahoma, upon a Hearing To Make Permanent the temporary injunction heretofore issued herein;

And the plaintiff, defendants and Intervenors being present by counsel, and announcing ready to proceed with said hearing;

Thereupon the following stipulations are had, evidence taken, exhibits introduced and proceedings had and recorded, to-wit:

[fol. 74] OFFERS IN EVIDENCE

The Court: All right, gentlemen, you may proceed.

Mr. Emery: With agreement of counsel and, of course, permission of the Court, I offer in evidence what have been marked by the reporter as Intervenor's exhibits "A", "B" and "C", and ask leave to withdraw the originals and substitute photostatic copies. (Exhibits at end of Evidence)

Mr. Updegraff: That is agreeable.

The Court: All right. They will be admitted and you may substitute photostatic copies for the record.

(Said exhibits appearing in this record at beginning page 112) (Ex. A 113: Ex. B 130: Ex. C 133:)

Mr. Emery: May the record show that at the time of the original appointment of the intervenors, Baum and Wieman—Baum's appointment, September 1, 1948—that a written memorandum or letter was written by the A & M College to each of these gentlemen, evidencing their appointment. Now, they don't have it in their files, but I understand that Mr. Albright, who is here, has a copy and knows that to be so.

Mr. Updegraff: I will stipulate this way: That these gentlemen, if on the witness stand, would so testify. I am waiv-

ing the question of competency and stipulating that they would so testify.

Mr. Emery: I would like to make a correction. Intervenor, Wieman's original appointment was September 1, 1947.

[fol. 75] The Court: All right; sir.

Mr. Emery: Intervenors would like to offer in evidence the stipulation filed by the Attorney General.

Mr. Updegraff: No objections.

The Court: It is admitted.

Mr. Emery: There is an exhibit on the declaration of policy attached. If the Court please, Intervenors would like to offer in evidence what has been marked as Intervenor's exhibit "D", which is a certification by the executive secretary of the defendant Board of Regents as to the appointment and salary and history of the intervenors.

Mr. Updergraff: No objections.

The Court: Then it is admitted.

(Said exhibit "D" appearing in this record at page 155).
(Exhibit D appears beginning page)

Mr. Emery: May it be admitted that the declarations in consolidated petition for intervention of each intervenor, as to citizenship and residence, is correct?

Mr. Updegraff: That may be admitted. I would also like to have you state in the record the place of residence of the national from Iran, here on scholarship.

Mr. Emery: All right. His name and address is Aboulghassem Zirakzadek, 6 Farvardin, Teheran, Iran. He is a citizen of Iran and came to the United States in January, 1948. He has not returned to Iran since coming to the [fol. 76] United States in 1948. He has been over here for two years on associate fellowship by invitation from A & M.

May it be admitted by the Attorney General and counsel for the plaintiff, that each of the intervenors do not advocate and do not belong to any organizations that advocate the overthrow — the government of the United States or the State of Oklahoma by force and violence?

Mr. Updegraff: No, I won't say that. I will say that each of them, if here to testify, would so testify.

Mr. Emery: Then, that their testimony as to the facts alleged in their consolidated petition in intervention may be considered as testimony in this case, as to all facts so alleged, without any challenge as to its competency?

Mr. Updegraff: That's right.

Mr. Hanson: That is satisfactory.

Mr. Emery: The intervenors now offer in evidence the consolidated petition in intervention, with the understanding that it will not encumber the case-made.

The Court: It is already a part of the record, anyway.

Mr. Emery: I would like the record to show, even though it is a part of the transcript, that I offered it in evidence.

The Court: Let the record show that the offer was made, and the consolidated petition will be admitted in evidence.

(The consolidated petition in intervention appears at page 33 of this case-made and its adoption by Aboulghassem Zirakzadek appears at page 247A½ of this case-made).

Mr. Updegraff: I would like the record to show that all [fol. 77] the papers heretofore filed have been withdrawn and re-filed after his petition in intervention was filed.

The Court: Let the record so show.

Mr. Hanson: If the Court please, we have admitted, with objections, certain and various matters presented, but in doing so, we would like to reserve out right to challenge the materiality.

The Court: You will be given that right.

Mr. Emery: May it be admitted that the defendant Board of Regents, up to this time, has taken no action in reference to the oath contained in House Bill No. 8 of the Twenty-third Legislature?

Mr. Hanson: It may be admitted.

Mr. Updegraff: I will admit that no action has been taken. I assume that there has been no action taken, according to the statement of the secretary of the Board.

Mr. Emery: All right.

The Court: If I understand you gentlemen correctly, there is no contention that any of these parties are Communists?

Mr. Updegraff: No. We don't say that at all.

Mr. Emery: There is no contention as to that.

The Court: And, they have refused to sign this oath because they are unwilling to bear arms in defense of the United States.

[fol. 78] Mr. Emery: That is one of the grounds, but there are several other grounds. The issues are much deeper than that.

Mr. Updegraff: I don't stipulate that none of these people are Communists. I stipulate only that if they were put on the witness stand they would so testify, and their testimony to that effect be considered as evidence in this case.

Mr. Emery: We offer in evidence what has been marked as Intervenor's exhibit "E".

Mr. Updegraff: No objections.

The Court: It will be admitted.

(Said exhibit appearing in this record, beginning at page 148).

Mr. Updegraff: It is hereby stipulated and agreed by and between the parties that the intervenor, Aboulghassem Zirakzadek, is permitted to intervene in said cause of action and the intervenor's petition may be amended to so state.

It is stipulated and agreed by and between the parties that Nancy Kent Siebur failed to file the oath.

[fol. 79] In District Court of Oklahoma County

[Title omitted]

Stipulation—Filed May 19, 1951

It is hereby stipulated and agreed by and between the plaintiff, defendants and intervenors in the above cause that the plaintiff is a taxpayer and citizen of the state of Oklahoma; that the teachers and professors referred to [fol. 80] in the pleadings herein were employed by the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges prior to April 9, 1951 to teach in the colleges referred to in the pleadings for and during the school year ending on or prior to June 30, 1951; that the other employees referred to in the pleadings were employed by

the defendant, Board of Regents, prior to April 9, 1951, to perform services in the colleges referred to in the pleadings for prescribed periods exceeding thirty (30) days, but not necessarily for the entire school year 1950-51; that said employments were made by virtue of recommendations of employment by the Presidents of said colleges to the defendant, Board of Regents, which recommendations were approved or ratified by the Board after the beginning of the fiscal year ending June 30, 1951, after which said teachers, professors and employees entered into the duties of their respective employments, all of which is reflected in the official minutes of the board; that no written contracts of employment were executed by said teachers, professors and employees with said Board of Regents, except as the above procedure may constitute the execution of such contracts; that the above procedure may constitute the execution of such contracts; that the procedure above outlined is in accord with the customary and traditional practice of said board in effecting the employment of teachers, professor- and employees in said colleges; that funds are now law- [fol. 81] fully available to pay the salaries of said teachers, professors and employees during the fiscal year ending June 30, 1951; that said teachers, professors and employees, including intervenors, have in all things complied with their respective employments and have done all things required by law in the performance thereof as a condition precedent and as a condition subsequent to the right to receive compensation therefor, except that same have not taken the oath set forth in Section 2, of house Bill No. 8 of the Twenty-third Oklahoma Legislature; that said teachers, professors and employees, including intervenors, have heretofore received payment under their respective employments up to and including the month of April, 1951, and are now ready, willing and able to perform, are now performing and will continue to perform services under their respective employments; and that the intervenors, Baum, Correll, Hunt, Schmoe and Nietz hold religious convictions against bearing arms against their fellow men.

It is further stipulated that "Part II, Text of Policy Statement," attached hereto as a part of this stipulation, constitutes the present policy, in so far as it affects Okla-

homa Agricultural and Mechanical Colleges only, adopted by the defendant board April 6, 1945, by the procedure reflected upon the official minutes of said board, as follows:

> "It was moved by Mr. Stuart, seconded by Mr. Harber that Dr. Bennett's recommendations for adoption [fol. 82] of policy statement of the President's committee dated April 10, 1945, consisting of pages 5 to 11, inclusive, be approved, as submitted, with one exception, viz., that salaries of Deans are to be from $4,000.00 to $7,500.00 instead of $4,000.00 to $6,000.00. Approval be subject to all limitations of the budget.
>
> "Motion carried."

It is also stipulated that A. S. J. Shaw is the duly elected, qualified and acting State Treasurer of Oklahoma; that Wilburn C. Cartwright is the duly elected, qualified and acting State Auditor of Oklahoma; that the compensation of the teachers, professors and employees referred to in the pleadings is largely paid from state funds; that attached to this stipulation is a list of teachers, professors and employees, separately listed as to colleges, of the colleges referred to in the pleadings who had not on or before midnight May 9, 1951 taken and subscribed to the oath as set forth in Section 2 of said House Bill; that included in said list are teachers, professors and employees who are nationals or citizens of other countries and teachers, professors and employees who have religious scruples against [fol. 83] bearing arms; and that any of the parties hereto reserve the right to introduce competent evidence at the trial of this cause with this stipulation.

Dated this 17th day of May, 1951.

Paul W. Updegraff, Attorney for Plaintiff; Mac Q. Williamson, Attorney General of Oklahoma; Fred Hansen, First Assistant Attorney General, Attorneys for Defendants.

Emery & Emery, by Robert J. Emery; Don Emery, Attorneys for Intervenors.

[fol. 84] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

INTERVENORS' MOTION FOR NEW TRIAL—Filed May 22, 1951

Comes now Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, Luella R. Nietz, and Aboulghassen Zirakzadek, intervenors herein, and each of them, and
[fol. 85] moves the court to vacate and set aside the judgment rendered herein on the 21st day of May, 1951, said judgment modifying the judgment rendered herein on the 21st day of May, 1951, said judgment modifying the judgment of this court rendered herein on May 19, 1951, the intervenors, and each of them, being aggrieved thereby, and to grant a new trial for the following causes which affect materially the substantial rights of the intervenors and each of them:

1st

The court erred in its findings of fact, because said findings of fact, and each of them, are contrary to law.

2nd

The court erred in its conclusions of law numbered First to Fourteenth, inclusive, and each of such conclusions, because they, and each of them, are contrary to law, for the reason that such conclusions of law, and each of them, violate the rights of intervenors, and each of them, protected by the following provisions of the Constitution of the State of Oklahoma, and for the reason that such conclusions, and each of them, violate the following provisions of the Constitution of the State of Oklahoma:

(a) Article VI, Sec. 31a; (b) Article II, Sec. 15;
[fol. 86] (c) Article II, Sec. 7; (d) Article V, Sec. 11; (e) Article I, Sec. 2; (f) Article V, Sec. 57; and (h) Article IV, in that House Bill No. 8, enacted by the 23rd Oklahoma Legislature, and signed by the Governor of the State of Oklahoma, April 9, 1951, each section thereof, the Oath set forth in Section 2 thereof, and each word, phrase, clause, sentence or other portion of said Oath, violates each and all of said

constitutional provisions hereinabove referred to, and violates the rights of intervenors, and each of them, protected by each of said constitutional provisions.

3rd

The court erred in its conclusions of law numbered First to Fourteenth, inclusive, and each of such conclusions, for the reason that such conclusions of law, and each of them, violate the rights of intervenors, and each of them, protected by the following provisions of the Constitution of the United States, and for the reason that such conclusions, and each of them, violate the following provisions of the Constitution of the United States:

(a) Article I, Section 8, providing that Congress shall have the power to raise and support armies, to provide and maintain a navy, to make rules for the government and the regulation of the land and naval forces; to organize, arm and discipline the militia; [fol. 87] That the Congress of the United States of America, prior to the effective date of the Act, did not consent that the State of Oklahoma exercise any of said powers constitutionally delegated to the Congress but did enact a comprehensive, complete and fully integrated legislative scheme in the exercise of each and all of such powers; that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, constitutes a purported attempt to exercise such powers so delegated and now exercised by the Congress of the United States of America;

(b) Article I, Section 10, providing that no state shall impair the obligations of contracts; that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portions thereof, impairs the obligation of each intervenor's contract;

(c) Article VI, Section 1, providing that the Constitution and laws of the United States of America which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States of America shall be the

supreme law of the land; that said Act and each section thereof, and the Oath and each word, phrase, clause, sentence or other portion thereof, violates the Constitution and laws of the United States of America [fol. 88] in the particulars heretofore and hereafter enumerated, and is in violation of treaties made under the authority of the United States of America, including the treaty effecting the membership of the United States of America in the United Nations Organization;

(d) The Fourteenth Amendment of the Constitution of the United States of America providing that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,

in that House Bill No. 8, enacted by the 23rd Oklahoma Legislature, and signed by the Governor of the State of Oklahoma, April 9, 1951, each section thereof, the Oath set forth in section 2 thereof, and each word, phrase, clause, sentence or other portion of said Oath, violates each and all of said constitutional provisions hereinabove referred to, and violates the rights of intervenors, and each of them, protected by each of said constitutional provisions.

4th

The court erred in rendering a judgment based upon such conclusions, and each of them, numbered First to Fourteen, inclusive, for the reason that such judgment in that respect violates the Constitution of the State of Oklahoma and the Constitution of the United States in the respects hereinabove enumerated, and violates the constitutional [fol. 89] rights of intervenors, and each of them, protected by the constitutional provisions of the State of Oklahoma and of the United States as hereinabove enumerated.

5th

The court erred in its Fifth conclusion of law denying Intervenors, and each of them, the right to receive compensation from said defendant Board of Regents for the reason that such finding in that respect violates the Constitu-

tion of the State of Oklahoma and the Constitution of the United States in the respects hereinabove enumerated, and violates the constitutional rights of intervenors, and each of them, protected by the constitutional provisions of the State of Oklahoma and of the United States as hereinabove enumerated.

6th

The court erred in its Sixth conclusion of law terminating the employment of the intervenors, and each of them, for the reason that such finding in that respect violates the Constitution of the State of Oklahoma and the Constitution of the United States in the respects hereinabove enumerated, and violates the constitutional rights of intervenors, and each of them, protected by the constitutional provisions of the State of Oklahoma and of the United States as hereinabove enumerated.

[fol. 90]

7th

The court erred in rendering judgment granting plaintiff a permanent injunction as prayed for in plaintiff's petition.

8th

The court erred in denying to intervenors, and to each of them, the mandatory injunction prayed for by each of the intervenors in their consolidated petition in intervention.

9th

That the court erred in the respects set forth in paragraphs Seventh and Eighth above for the reason that the court's judgment in each of such respects has no authority in law and violates the Constitution of the State of Oklahoma and the Constitution of the United States in the respects and for the reasons hereinabove enumerated.

10th

The court erred in the conclusion of law and in rendering judgment to the effect that the employment of intervenors, and each of them, with the defendant Board of Regents is terminated because conclusion and judgment predicated

thereupon is not warranted in law upon the basis of any of the pleadings filed herein or upon the basis of the plaintiff's prayer for relief.

[fol. 91]

11th

The court erred in denying to intervenors, and each of them, the right to file a motion requesting findings of fact and conclusions of law for the reason that such denial violates the Constitution of the State of Oklahoma and the Constitution of the United States in the respect hereinabove enumerated and for the reasons heretofore stated.

12th

The court erred in rendering judgment granting plaintiff a permanent injunction because the same is contrary to law.

13th

The court erred in denying to intervenors, and each of them, a mandatory injunction as prayed for in their consolidated cross action because such denial is contrary to law.

14th

The court erred in rendering a judgment predicated upon said findings of fact, and each of them, and conclusions of law, and each of them, because such rendition is contrary to law.

[fol. 92]

15th

The court erred in granting a permanent injunction enjoining defendants and each of them from making payments of compensation lawfully due intervenors, and each of them, without requiring plaintiff to give bond because the granting of such permanent injunction under such circumstances is contrary to law.

16th

The court erred as to intervenor Aboulghassen Zirakzadek in failing to provide in the court's eighth conclusion of law, and in failing to provide in the judgment, an opportunity for said intervenor to take the oath as modified or as per-

mitted by the court in the judgment, and the modified judgment, rendered herein.

Wherefore, premises considered, the intervenors herein, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schmoe, Luella R. Nietz, and Aboulghassem Zirakzadek, and each of them, pray the court to grant him, or her, a new trial in this cause, and for all other relief to which the intervenors and each of them may be entitled.

Emery & Emery, Attorneys for Intervenors, by Robert J. Emery. Don Emery.

[fol. 93] [File endorsement omitted.]

[fol. 94] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

ORDER OVERRULING MOTION OF INTERVENORS, AND EACH OF THEM, FOR A NEW TRIAL—Filed May 22, 1951

On this 22nd day of May, 1951, there came on for hearing [fol. 95] the motion of the intervenors, herein, and each of them, for a new trial, filed May 21, 1951, and the motion for a new trial filed by intervenors, and each of them, on May 22, 1951, plaintiff being present by his attorney, Paul W. Updegraff, and the defendants being present by their attorneys, Mac Q. Williamson, Attorney General of the State of Oklahoma, and Fred Hansen, Assistant Attorney General of the State of Oklahoma; and the Court having heard the arguments of counsel, and being fully advised, upon consideration finds that the said motions for a new trial, and each of them, should be overruled.

It Is, Therefore, Ordered and Adjudged that the motions of the intervenors, and each of them, for a new trial filed respectively on May 21, 1951, and May 22, 1951, be and the same are hereby overruled, to which rulings of the court, and each of them, the Intervenors, and each of them, then and there excepted, and gave notice in open court of his or her

intention to appeal to the Supreme Court of the State of Oklahoma.

And said intervenors, and each of them, praying an appeal to the Supreme Court, and an extension of time within which to make and serve case-made, it is ordered that fifteen (15) days from this date be granted said intervenors, and each of them, to make and serve case-made, plaintiff and each of said defendants to have three (3) days thereafter to [fol. 96] suggest amendments, same to be settled on three (3) days' notice in writing by any party to this action.

W. A. Carlile, District Judge.

O. K.: D. E.

[File endorsement omitted.]

[fol. 97] In District Court of Oklahoma County

[Title omitted]

Journal Entry of Judgment—Filed May 28, 1951

Be It Remembered that on the 19th day of May, 1951, the above entitled case came on for hearing. The plaintiff appeared in person and the defendants, Board of Regents, the State Treasurer, and State Auditor, appeared by Mac Q. Williamson, Attorney General of the State of Oklahoma, and Fred Hansen, First Assistant Attorney General of the State of Oklahoma, and the Intervenors, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Malcolm Correll, Lillian A. Schnoe, Luella R. Nietz, and Aboulhassem Zirakzadek, appeared in person and by counsel, Don Emery and Robert J. Emery.

[fol. 98] All parties thereupon announced ready for trial, and the intervenors requested and received permission to file their plea in intervention. The plaintiff thereupon filed a motion to strike the cross petition of the intervenors instanter against the Board of Regents, et al, which motion was overruled and exceptions allowed plaintiff; the plaintiff thereupon requested and received permission to file instanter a demurrer to the interpleaders' action for mandamus and cross petition, which motion was overruled and excep-

tions allowed plaintiff; the plaintiff thereupon requested and received permission to file instanter a reply to the answer of the defendants, Board of Regents, et al, and also an answer to the intervenors' plea of intervention. Thereupon Aboulhassem Zirakzadek requested and was granted permission to become a party to the consolidated petition of intervention, which permission was granted with the understanding that Mr. Emery would prepare and file an amendment to his consolidated petition of intervention and cross petition, and the same was ordered filed.

Thereupon the plaintiff requested and was granted permission to withdraw all of his pleadings heretofore filed and file them in sequence with the same force and effect as if they were specifically refiled herein, after the plea of intervention of Aboulhassem Zirakzadek, and the orders heretofore made concerning the said motions and exceptions [fol. 99] to ruling be and remain the same.

All parties thereupon again announced they were ready to proceed with the hearing, and the stipulations were thereupon submitted and filed in said cause, and the parties filed their documentary evidence which has become an official part of the record in this case;

That thereafter on the said 19th day of May, 1951, this matter came on for oral argument and the case was argued by all parties, and at the conclusion of said argument the court, being fully advised in the premises, made findings of fact and conclusions of law.

That thereafter, on May 21, 1951, the defendants, Board of Regents, State Treasurer of Oklahoma, and State Auditor of the State of Oklahoma, filed in the said court their application to modify the findings of fact and conclusions of law rendered on May 19, 1951, and the court, upon hearing the motion, sustained the motion in part and overruled it in part. Whereupon the court made the following findings of fact and conclusions of law:

Findings of Fact

The Court finds the facts in this case to be as set forth in the stipulations entered into by and between the parties, and that the parties have agreed that the case comes on for hearing on the permanent injunction.

[fol. 100] CONCLUSIONS OF LAW

1st

The Court concludes that the plaintiff is a taxpayer and citizen of the State of Oklahoma and a proper party to bring this action; it is so ordered.

2nd

The Court concludes that the effective date of Enrolled House Bill No. 8 passed by the Twenty-Third Legislature is midnight, May 9th, 1951; and it is so ordered.

3rd

The Court concludes that the teachers, professors, and other employees of the defendant, Board of Regents, may be paid from State funds for the first nine days of May, 1951; and it is so ordered.

4th

The Court concludes that each teacher, professor and employee who has wilfully or negligently failed to take and subscribe to the oath, as provided in Section 2, Enrolled House Bill No. 8, by midnight May 9th, 1951, cannot be paid from State funds, after midnight May 9th, 1951, and concludes that any teacher, professor and employee absent [fol. 101] from the State May 9th, 1951, on authorized leave, may be paid regularly and as provided by law during the time of any such absence on authorized leave, and up to and including thirty (30) days after terminating such leave, and up to and returning to work or to the duties of the office or employment of such person; and thereafter in usual and proper form, provided that such person has, during such thirty-day period after returning from said leave, taken said oath in manner and form as prescribed by law, unless an honest mistake or clerical error has been made in any oath that might have been filed, in which event a correction may be made or an amended oath filed, to clearly set it out; it is so ordered.

5th

The Court concludes that each teacher, professor, and employee who has taken and subscribed to an oath by mid-

night May 9, 1951, and filed it with the officer, agency, authority, department, commission, or institution in and for which the person executing the oath or affirmation is employed or appointed or to which said person is elected, and which oath taken and subscribed is not the oath provided in Section 2 of the Act, cannot take and subscribe to a new oath, unless an honest mistake or clerical error has been made in the preparation of the oath signed; that such teacher, professor and employee who fails to take and subscribe to the oath or affirmation required in said Act has forfeited his or her right to receive pay; it is so ordered.

[fol. 102]

6th

The Court concludes that the intervenors, and each of them, did not take and subscribe to the oath as provided in section 2 of the Act and wilfully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered.

7th

The Court concludes that the words "if necessary", following the phrase, "I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary", means that the Congress of the United States within the powers granted them under the Constitution of the United States and the various selective laws passed by the Congress, will determine when and if it is necessary for any person taking and subscribing to the oath in this Act to bear arms; that such proviso is constitutional. It is so ordered.

8th

The Court concludes that non-citizens of the United States employed by the State must take and subscribe to the oath as provided in the Act, and that the words, "if necessary" following the phrase, "I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary", as applied to them does not violate any of the constitutional rights guaranteed them under the Four-
[fol. 103] teenth Amendment, or other Constitutional or statutory provisions of the United States, or the Constitu-

tion or any statutory provisions of the State of Oklahoma, nor does it violate any treaty agreement with other nations or between the signers of the United Nations. The Congress of the United States, in various selective service, if any, the nationals of other countries must render, taking into consideration the treaty agreements with each country and between the United Nations. It is so ordered.

9th

The Court concludes that that portion of the said oath which requires the teachers, professors and employees of the defendant Board of Regents, including these intervenors, to state:

> "I am not affiliated directly or indirectly * * * with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; * * *"

and to further state:

> "That within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member * * * of any agency, party, organization, [fol. 104] association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization,"

are valid provisions of the law. The Court concludes that said provisions are constitutional in all respects and are applicable to any such organization which prior to April 9, 1951, has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization, and the words "officially determined" mean such listed organizations as have been afforded an opportunity to present their case; Joint Anti-Faseist Refugee Committee, Petitioner, v. J. Howard McGrath, Attorney General of the United States, et al (decided by the Supreme Court of the

United States, April 31, 1951), and it was the express intention of the legislature, by the words "has been" to mean only those organizations found to be subversive prior to the effective date of the Act, to-wit: April 9, 1951, and does not apply to any organization declared to be subversive after April 9, 1951, and the Court concludes that the legislature may adopt by reference any report or lists of the United States Attorney General or other authorized agency of the United States wherein it has been officially determined that any organization is a communist front or other subversive [fol. 105] organization. It is ordered.

10th

The Court concludes that the legislature had the right, within the "police power", to enact legislation affecting the vital welfare of the State and Nation, and that Enrolled House Bill No. 8 passed by the Twenty-third Legislature does not impair the obligation of contracts; it is so ordered.

11th

The Court concludes and does hereby take judicial notice of the threat to our liberties and way of life, and that prior to the passage of this Act a person could obtain a job in our colleges, universities and public schools without declaring his loyalty to his employer, the people of the State of Oklahoma, and of the stress of the times and the need for protection from our enemies, foreign and domestic, and of the advocacy of persons, groups and organizations to overthrow our government by force and violence; and that the legislature of Oklahoma, in the exercise of its police powers, has wide discretion in determining what is necessary, as an exercise of police power, to protect the general welfare of its people, and so far as constitutional issue is concerned the power of the State, when otherwise justified, [fol. 106] is not diminished because of a private contract which may be affected. All contractual obligations between the Board of Regents and teachers, professors and employees, including the intervenors, are subject to Enrolled House Bill No. 8 of the Twenty-third Legislature; it is so ordered.

Now, it is the further order of this Court that in the event

the Board of Regents found that an honest mistake has been made in the oath so filed, in the name, designation of the position held, or any other clerical error, that said error may be corrected by the taking of a new oath.

12th

The Court concludes that the injunction should be made permanent in all things as prayed in plaintiff's petition; it is so ordered.

13th

The Court concludes that there may be clipped to the original oath a statement of a non-citizen, if he so desires, the following statement:

"I further state that I am a citizen, or subject, of ....., and that I have taken the foregoing oath, subject to my allegiance to, and rights and obligations as a citizen, or subject, of .....

Dated this ..... day of ....., 1951."

[fol. 107] And upon timely filing thereof, his rights to receive compensation shall not be prejudiced.

14th

In view of the findings and judgment of this Court, this 21st day of May, 1951, made in this litigation and this hearing, to the effect that non-nationals may be permitted to execute an additional and explanatory statement along with their oath of allegiance, the court now finds and concludes that all non-nationals who have heretofore, because of misunderstanding or honest mistake, have failed, up to this time, to execute the oath in the manner and form as provided herein, together with the explanatory statement, as provided herein, that all such non-nationals may have a reasonable time after the execution of this judgment, this date, by the Court, within which to properly prepare, take and file said oath, not to exceed 10 days; and it is so ordered.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and

the intervenors. Exceptions allowed to all parties.

Motions for new trial of the plaintiff, the defendants, and [fol. 108] each of them, and the intervenors, and each of them, were overruled and exceptions allowed all parties; plaintiff, defendants and intervenors gave notice of their intention to appeal to the Supreme Court of Oklahoma, and the same was ordered noted on the docket; and the court ordered no supersedeas bond could be filed in said cause and gave all parties fifteen days within which to make and serve a case-made; each party to have three days to suggest amendments. The case-made and amendments shall, upon three days' notice, be submitted to the Judge who shall sign and settle the same, and cause it to be attested by the clerk. Said appeal must be lodged in the Supreme Court of Oklahoma within the time allowed by law.

Dated this 21st day of May, 1951, in Oklahoma City, Oklahoma.

W. A. Carlile, District Judge.

[fol. 109] In District Court of Oklahoma County

Notice of Intention to Appeal

Be It Remembered, that the intervenors, and each of them, in open court upon the 19th day of May, 1951, duly excepted to each and every finding of fact, and each and every conclusion of law rendered on the 19th day of May, and to the judgment of the court based thereupon and rendered on said day, which exceptions were allowed, and thereupon the intervenors, and each of them, gave notice of his, or her, intention to appeal to the Supreme Court of Oklahoma, and

Be It Further Remembered, that the intervenors, and each of them, in open court upon the 21st day of May, 1951 duly excepted to each and every finding of fact, and each and every conclusion of law rendered on May 21, 1951, and to the judgment based thereupon rendered on said day, which exceptions were allowed, and thereupon the intervenors, and each of them, gave notice of his, or her, intention to appeal to the Supreme Court of Oklahoma.

[fols. 110-111] CERTIFICATE OF JUDGE PRESIDING AT TRIAL

[Omitted in printing]

[fol. 112] IN SUPREME COURT OF OKLAHOMA

No. 35160

THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, Plaintiffs in Error

Also

ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, Samuel Lee Hunt, Jr., Malcolm Correll, Lillian A. Schmoe, Luella Nietz and Aboulhassan Zirakzadek, Intervenors, Plaintiffs in Error

v.

PAUL W. UPDEGRAF, Defendant in Error

OPINION—Filed October 18, 1951

SYLLABUS

1. The authority of the Legislature extends to all rightful subjects of legislation. It is not only the duty of the Legislature but it has the power to protect the general welfare of the people of the State by the exercise of the police power against subversive influences. 51 O.S. 1941 (Supp.) 37.1 to 37.8 constitutes an exercise of the police power by the Legislature. Such acts are valid so long as they are not unreasonable, arbitrary, and capricious and do not violate any of the fundamental constitutional guaranties of the State and Federal Constitutions.

[fol. 113] 2. Loyalty of public officials and employees of the state is essential to the preservation of the peace and welfare of the people and may be prescribed as a qualification to hold public office or public employment by the state.

3. A loyalty oath required by an act of the Legislature

fixing loyalty as a qualification for public officials and employees of the state may be required as a necessary precedent to the right to continue in the service of the state and draw compensation therefor so long as the terms thereof are reasonably referable and cognate to the purposes of the act and do not violate constitutional guaranties.

4. The foregoing act is not a bill of attainder or ex post facto law; nor does the oath required therein violate Article I Section 10, Constitution of the United States or Article II Section [redacted] Constitution of Oklahoma (inhibition against impairment of contract); the Fourteenth Amendment to the Constitution of the United States or Article II Section 7 of the Constitution of Oklahoma (due process clause); the First Amendment to the Constitution of the United States or Article I Section 2 of the Constitution of Oklahoma (free exercise of religion).

[fol. 114] Appeal from the District Court of Oklahoma County

The Honorable W. A. Carlile, Judge

Affirmed

Action to enjoin payment of salaries of teachers, professors, and other employees of the Oklahoma Agricultural Colleges, and cross-action for mandamus or mandatory injunction to require such payment.

Mac Q. Williamson, Attorney General; Fred Hansen, First Assistant Attorney General, of Oklahoma City, Oklahoma, for Plaintiffs in Error.

Don Emery, Robert J. Emery, Emery & Emery, of Oklahoma City, Oklahoma, for Intervenors Plaintiffs in Error.

Paul W. Updegraff, of Norman, Oklahoma, for Defendant in Error.

John G. Hervey, Ralph J. May, Hervey & May, of Oklahoma City, Oklahoma, Amicus Curiae.

[fol. 115] Arnold, C. J.:

This action was begun in the District Court on May 9, 1951, by a taxpaying citizen to enjoin the Board of Regents

of the Agricultural Colleges, the State Treasurer, and the State Auditor from paying public funds to teachers in the Agricultural and Mechanical College at Stillwater who had not subscribed to and filed the loyalty oath prescribed by Enrolled House Bill No. 8, 23rd Legislature (Laws 1951; 51 O. S. 1941 (Supp.) 37.1-37.8). A temporary restraining order was issued.

Before the date fixed for the hearing on the application for temporary injunction, certain teachers in the College who had contracts with the Board of Regents to teach at least to the end of the school term, June 30, 1951, with leave of court filed their consolidated petition in intervention and cross petitions praying for injunctive relief requiring the payment of their accrued monthly salaries.

When the cause came on for trial evidence by stipulation was introduced and entertained. The trial court made conclusions of law and entered the following judgment:

> [fol. 116] "It Is Therefore Ordered, Adjudged and Decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and the intervenors. Exceptions allowed to all parties."

The cross petitioners, none of whom had filed the oath required by the Act at the time of trial and entry of judgment in the latter part of May, 1951, and the Board of Regents make many contentions. It is not necessary nor expedient to set forth the various and varying contentions made by appellants. Only those propositions asserted which are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors will be discussed.

Pertinent to the issues raised here the act provides:

> Every officer and every employee of the State, county, school district, municipality, public agency, public authority, or public district shall within the first thirty (30) days after taking office, or within the first thirty

(30) days of such employment, take and subscribe to the oath or affirmation required by this Act. * * * [fol. 117] Any officer or employee of the State, County, school district, municipality, public agency, public authority, or public district who fails to take and subscribe the oath or affirmation required by this Act within the time specified in this Section, shall forfeit his or her office or employment.

"The oath or affirmation required by this Act shall be the following:

"I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that during such time as I am ..... (Here put name of office, or, if an employee, insert 'An employee of' followed by [fol. 118] the complete designation of the employing officer, office, agency, authority, commission, department or institution.)

I will not advocate and that I will not become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means."

The Act further provides:

"No compensation nor reimbursement for expenses incurred shall be paid to any public officer or employee by any public agency unless such officer or employee has taken and subscribed to the oath or affirmation required by this Act."

The act provided for severability as to the various provisions thereof and severability as to parts of the oath.

Before going further into a specific discussion of alleged invalidity for certain stated reasons the apparent confusion as to the interpretation to be given the parts of the [fol. 119] oath required should be dispelled. The phrase of the oath which refers to affiliation "with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization" refers to a list or lists of such organizations in existence at the time of the passage of the act which had been prepared by the Attorney General under Governmental directive. Such list or lists are in effect made a part of the oath by reference. It must be assumed they are readily obtainable. Nothing appears to the contrary. There was no attempt on the part of the Legislature to confer authority, judicial or otherwise, upon the Attorney General in the preparation of said list or lists. It also must be assumed that the Legislature determined for itself that all those groups so listed by the Attorney General, whether foreign or domestic, were subversive organizations or communist fronts. To illustrate: one taking the oath swears that he is not affiliated "with any foreign political agency" listed by the Attorney General as being a communist front or subversive organization. This part of the oath does not contemplate non-membership in any organization, foreign or domestic, which does not appear on the list or lists of the [fol. 120] Attorney General in existence at the time of the passage of the act. There is no requirement in the act that an oath be taken of non-membership in organizations not on the list of the Attorney General of the United States at the time of the passage of this act.

That part of the oath "that I will take up arms in defense of the United States in time of War or National Emergency, if necessary" means that the affiant will take up arms in time of War or National Emergency if by law required.

That part of the oath that says "that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, * * *" refers to the same organizations listed

by the Attorney General and in existence at the time of the passage of the Act. It has no reference to organizations that may have been added by the Attorney General after the passage of the act and up to the time of the taking of the oath. The oath under this phrase is to the effect that affiant has not been a member of any of the organizations so listed by the Attorney General within the five year period previous to the taking of the oath.

The statement in the oath: "That I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, [fol. 121] foreign and domestic" means that the affiant, be he citizen or resident alien, will support and defend the laws of this land and the form of government which is thereby established against all enemies, that is, subversive elements, whether foreign or domestic.

That part of the oath "That I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma" is objected to only by a friendly alien. He asserts sincere fear that the oath in the respects hereinafter mentioned would in effect require him to forswear allegiance to his native country.

> "Allegiance is of three kinds: (1) *natural or implied*, when it arises by operation of law, as in the case of natural-born subjects; (2) *acquired*, when it is owed by a person as a result of his receiving the rights of citizenship, as by naturalization or denization; (3) *local*, when it arises merely from the fact of residing in and receiving the protection of a country as in the case of a resident alien."
>
> Webster's International Dictionary.

Obviously, a resident alien taking the oath would be pledging allegiance of the local type; there is nothing in the oath which requires him to forswear his allegiance to his [fol. 122] native country or the country of which he may be a citizen, nor is there anything in the oath which would conflict with any allegiance owed by him to the country of which he is a national. Any resident alien is bound to obey our laws as a condition of his residing here and receiving the protection of our laws, which he is entitled to if law-

fully in the United States. If an employee of the State, it is just as necessary that he be loyal to our government, its laws and institutions while here and enjoying the full protection of our laws and sharing the benefits that our institutions and form of government afford as it is that our citizens under like circumstances be loyal. He is also under the misapprehension that the requirement of the oath that "I will take up arms in the defense of the United States in time of War, or National Emergency, ~~if necessary~~" constitutes an assertion or oath by him that he would take up arms against the government of which he is a citizen. This part of the oath does not include or refer to a resident alien's native country of which he is a citizen. This conclusion is inescapable in recognition of the reasonableness and fairness of the Legislature. This interpretation will no doubt dispel any fears in the mind of such friendly alien. The Legislature did not intend to require as a condition precedent to employment by the State that one take an oath that in case of war he would bear arms against his native land.

[fol. 123] The real design and purpose of the Legislature in the enactment of House Bill No. 8 is not difficult to ascertain. The real purpose of the Legislature was to make loyalty a qualification to hold public office or be employed by the State. Incidentally and in order to effectuate its real purpose the Legislature also intended by the Act to force officers or employees of the State who are or have been within a fixed time members of the Communist Party or other subversive organizations out of governmental positions. It is now commonly known that the Communist Party and its members advocate the overthrow of government by force and violence. Such teaching and advocacy is contrary to our Democratic form of government and detrimental to the welfare of the people. The same thing may be said of any other subversive organization. Inasmuch as the authority of the Legislature extends to all rightful subjects of legislation it is not only the duty of the Legislature but it has the power to protect the general welfare of the people of the State by the exercise of the police power against subversive influences. The act in question constitutes an exercise of the police power by the Legislature. Such acts are valid so long as they are not

unreasonable, arbitrary, and capricious and do not violate any of the fundamental constitutional guaranties of the [fol. 124] State and Federal Constitutions. We recently said in the case of Palmer Oil Corp. v. Phillips Petroleum Co., et al., — Okla. —, 231 P. 2d 997:

> "The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be arbitrary, capricious, and unreasonable, and hence irreconcilable with the conception of due process of law. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are ordinarily matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

The Act does not impair obligation of contract contrary to Article II, Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States.

> [fol. 125] "All parties dealing with a sovereign power, or one of its functionaries, in the exercise of governmental power, the subject of which pertains to government (schools in this case), do so knowing it cannot contract the power conferred for self-protection or self-preservation. The rule, therefore, that the Legislature can pass no law impairing the obligation of contracts does not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject matter of the contract is one which affects the safety and welfare of the public. In such cases, 'the presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such sub-

jects from the police power of the Legislature'. Chicago, B. & O. Rr. v. Nebraska, 170 U. S. 72, 42 L. Ed. 948, 18 Sup. Ct. 513."

Board of Education of the City of Leavenworth v. Phillips, 67 Kan. 549, 73 P. 97.

[fol. 126] To hold otherwise would be to subject the exercise of the police power inherently vested in a sovereign people to the will of contracting individuals. See Boston Beer Co. v. Mass., 97 U. S. 33, 24 L. Ed. 989.

The statute and the required loyalty oath do not deprive public officials and employees of property or liberty without due process of law. The intervenors are employees of the state as teachers in a public institution. They have no constitutional right to be so employed. They have no right to so serve the state except upon such terms as the state prescribes. The act does not purport to take away their right to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them. People v. Crane, 214 N. Y. 154, 108 N. E. 427, L. R. A. 1916D 550; Heim v. McCall, 239 U. S. 175, 60 L. Ed. 207, 36 Sup. Ct. 78; Ellis v. U. S., 206 U. S. 246, 51 L. Ed. 1047, 27 Sup. Ct. 600; McAuliffe v. Mayer, etc., City of New Bedford, 155 Mass. 216, 29 N. E. 517.

Like the success of a business, the preservation of peace, the public welfare and the integrity of law and order, in fact, our form of government, are dependent upon loyalty of public officials and employees of government. This is well known and fully recognized by all well intentioned people. Public officials assume office and employees of the [fol. 127] state enter upon their duties with full knowledge, and in these times expectation, that the state will, if it has not already done so, make full investigation on the point and if thought expedient require an oath disclosing the attitude of public officials and employees. Loyalty should be and by House Bill No. 8, 23rd Legislature, is a prescribed qualification of public officials and employees of the state. Intervenors are such employees.

It is alleged by some conscientious objectors that the required loyalty oath invades their freedom of religion guaranteed by both the State and Federal Constitutions. The part of the oath which it is alleged so invades this guaranty

is "that I will take up arms in defense of the United States in time of War, or National Emergency, if necessary" (that is, if by valid law required). The provisions of the Constitutions against the enactment of any law pr-hibiting the free exercise of religion "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Cantwell et al. v. State of Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213. Though some sort of exemption has always been provided for conscientious objectors in the matter of bearing arms in time of war, such persons [fol. 128] could be legally required to bear arms. Under such a legal requirement a citizen of the United States, though a conscientious objector, would be disloyal if he absolutely refused to obey such law. Loyalty in upholding the Constitutions and laws, State and Federal, may be made a qualifying prerequisite to employment by the State. Religious practice, though in conformity with religious belief, may be interfered with where such practices are in violation of law. A conscientious objector taking the oath required can still entertain such religious beliefs as his conscience dictates and act freely in the exercise thereof so long as he does not violate or refuse to obey laws. The required oath does not invade one's constitutional right to the free exercise of religion guaranteed by Article I, Section 2 of the Oklahoma Constitution and the First Amendment of the Federal Constitution. For interesting reading on the subject see Cooley v. Watkins, 2 Idaho 590, 22 Pac. 102.

Is this act a bill of attainder or ex post facto law? A bill of attainder is a legislative act, which inflicts punishment *punishment* without judicial trial. It is contended that the act is a bill of attainder because it punishes one for refusal to take an oath that he has not been a member of listed organizations by vacating his position and denying him com- [fol. 129] pensation. We think the Supreme Court of the United States has answered the question in Garner v. City of Los Angeles, 98 A. C. A. 694, 71 Sup. Ct. 909, decided June 4, 1951. In that case civil service employees of the City of Los Angeles were discharged because they would not subscribe to an oath similar to that provided by the Oklahoma Act. In upholding the ordinance requiring the taking of

such an oath and holding that the ordinance was not a bill of attainder the United States Supreme Court said:

> "We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

An ex post facto law is one which provides a punishment for an act which was innocent when committed. Punishment is a necessary incident to either a bill of attainder or an ex post facto law. Punishment such as contemplated by the inhibiting clauses of the State and Federal Constitutions is not present here. The act is neither a bill of attainder nor an ex post facto law.

The Legislature had the power and authority to prescribe qualifications for teachers in our public institutions, and the duty to do so, and if it deemed necessary require a loyalty oath as a qualifying and necessary precedent to compensation for services rendered by employees of the state.

[fol. 130] The Legislature had the power and duty to prescribe qualifications for teachers in our public institutions. The loyalty oath required as a prerequisite to payment for teaching in our public institutions cannot be said as a matter of law to be unreasonable, arbitrary, and capricious or to violate any constitutional rights guaranteed by either the State or Federal Constitutions. All parts of the loyalty oath required appear to be reasonably related to the purposes of the Act.

The judgment denying injunctive relief to intervenors on their cross petitions is affirmed.

Halley, V. C. J., Welch, Corn, Gibson, Johnson, O'Neal, and Bingaman, JJ., Concur.

[fol. 131] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER—Filed October 24, 1951

It is hereby ordered that the name of defendant in error in the caption of the above s-yled cause be corrected to read "Paul W. Updegraff,"

Done by order of court this 24th day of October, 1951.

Ben Arnold, Chief Justice.

[fols. 132-134] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER—Filed November 16, 1951

It is hereby ordered that the vote shown on the opinion filed on October 18, 1951, be deleted.

Done by order of court this 15th day of November, 1951.

Ben Arnold, Chief Justice.

[fol. 135] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION OF INTERVENORS, PLAINTIFFS IN ERROR, FOR A REHEARING—Filed October 31, 1951

Come now Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, Luella Nietz and Aboulghassem Zirakzadeh, plaintiffs in error, who were intervenors in the Trial Court, hereinafter called petitioners, and seek a rehearing

[fol. 136] of the decision and opinion of the Court entered and rendered herein on the 18th day of October, 1951, wherein and whereby the Court affirmed the judgment of the Trial Court that "the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and the intervenors."

The sixth conclusion of law of the Trial Court read:

> "The intervenors and each of them did not take and subscribe to the Oath as provided in Section 2 of the Act, and wilfully refused to take the Oath, and by reason thereof the Board of Regents is enjoined from paying them and their employment is terminated. It is so ordered."

The applicable statute involved is referred to in the Court's opinion as: "Enrolled House Bill No. 8, 23rd Legislature (Laws 1951; 51 O. S. 1941 (Supp.) 37.1-37.8)."

The issues turn upon the assertion by petitioners, as well as other plaintiffs in error, namely, the Board of Regents of Oklahoma Agricultural and Mechanical College, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, that the Act and the Oath required by the Act violate the constitutional righs of petitioners in several respects [fol. 137] under the Constitution of the State of Oklahoma and under the Constitution of the United States.

Since some petitioners assert a violation of their constitutional rights under the Constitution of the United States in addition to violations asserted by other petitioners, this petition for rehearing is divided into three parts so that each part will constitute a separate motion for rehearing as to petitioners embracing each separate part.

Part I will be constituted by the complaints against the Court's decision and opinion of all petitioners, and will assign grounds for rehearing common to all intervenors.

Part II will be constituted by the complaints against the Court's decision and opinion of petitioners who hold sincere religious belief that the bearing of arms against one's

fellow man is contrary to Divine Law and contrary to the Will of God.

Part III will be constituted by the complaints against the Court's decision and opinion asserted by the one petitioner who is a foreign national.

Part I

All petitioners state the following as their grounds of complaint and as reasons for a rehearing:

1. The Court wholly overlooked a question decisive of the case, namely, that the construction of the Act and the [fol. 138] Oath given by the Court in the respects hereinafter set forth, rendered the Act and the Oath as to intervenors, as of the time each intervenor was required to take the Oath, so vague that men of common intelligence must guess at its meaning and differ as to its application, and in this connection the Court wholly overlooked that the Act and the Oath denied life, liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by denying compensation contractually due and by forfeiting contracts of employment for failure to take the Oath. The construction of the Oath hereinabove immediately referred to are:

(a) By construing "any foreign political agency, party, organization or government" as meaning any foreign political agency, party, organization or government officially determined by the United States Attorney General or other authorized agency of the United States to be a Communist front or subversive organization.

(b) By construing the language of the Oath, "that I am not affiliated directly or indirectly with" to mean "that I was not affiliated directly or indirectly with at the time of the passage of the Act."

[fol. 139] (c) By construing the language of the Oath, "that within five (5) years immediately preceding the taking of the oath I have not been a member," to mean within the five years immediately preceding the passage of the Act, without regard to when the Oath is taken.

(d) The language of the Oath, "that I will take up arms in defense of the United States in time of war or national emergency if necessary," means in respect of the words "if necessary," if by law required.

Petitioners could not be expected to know, at the time each took the Oath, that the Oath meant what the Court ultimately construed it to mean.

2. The Court wholly overlooked that, after purporting by quotations from the Act in its opinion to set forth the Oath in its entirety, there was nevertheless set forth only the first and last paragraphs of the Oath, thus rendering later references to the Oath in the Court's opinion unintelligible and required to be considered out of context, and thus rendering a review of the Court's opinion extraordinarily difficult, either upon this petition for rehearing or upon petition for review to the Supreme Court of the United States. The Court owes petitioners, under the due process [fol. 140] clause of the Fourteenth Amendment to the Constitution of the United States, the procedural right and protection to render its opinion intelligible and reasonably amenable to review, which was not done by reason of the omissions and references hereinabove set forth.

3. The Court wholly overlooked, in setting forth the first and last paragraphs of the Oath as the only parts thereof pertinent to the issues, that such paragraphs were the only paragraphs not under specific and separate attack upon asserted grounds of unconstitutionality, both in respect of the Constitution of the State of Oklahoma and of the Constitution of the United States. In this connection, it wholly overlooked including the middle or second paragraph of the Oath, which is the only paragraph of the Oath under specific and separate attack by petitioners upon said asserted unconstitutional grounds. And, additionally, in this same connection, the Court wholly overlooked that, after asserting that the first and last paragraphs of the Oath were the only parts thereof pertinent to the issues, it proceeded to discuss immediately thereafter as pertinent to the issues, in the paragraph following the first and second paragraphs of the Oath, the meaning of certain phrases and clauses of the third or middle paragraph of the Oath omitted in the Court's opinion.

4. The Court wholly overlooked considering and passing upon the following constitutional issues, decisive of the [fol. 141] case, properly and timely raised in the Trial Court by consolidated petition in intervention and by motion for a new trial and by exceptions to the Trial Court's judgment, and in the Supreme Court by assignments of error and the assertion of appropriate propositions of law in petitioners' brief. Such issues, to which the Court overlooked giving consideration, embraced provisions of both the Constitution of the State of Oklahoma and the Constitution of the United States, as follows:

(a) Constitution of the State of Oklahoma:

Article VI, Section 31a, reposing in plaintiff in error, Board of Regents, the exclusive power to govern the Oklahoma Agricultural and Mechanical College, so as to preclude on the part of the Legislature a prescription of qualification for its employees.

(b) Constitution of the United States:

That the Act and the requirements of the Oath, in respect to the bearing of arms in defense of the United States, invade the exclusive power of the Congress to raise an army, and provide a navy under Article I, Section 8 of the Constitution of the United States.

5. The Court in its decision held that:

[fol. 142] "Before going further into a specific discussion of alleged invalidity for certain stated reasons the apparent confusion as to the interpretation to be given the parts of the oath required should be dispelled. The phrase of the oath which refers to affiliation 'with any foreign political agency, party, organization or government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization' refers to a list or lists of such organizations in existence at the time of the passage of the act which had been prepared by the Attorney General under Governmental

directive. Such list or lists are in effect made a part of the oath by reference. It must be assumed they are readily obtainable. Nothing appears to the contrary. There was no attempt on the part of the Legislature to confer authority, judicial or otherwise, upon the Attorney General, in the preparation of said list or lists. It also must be assumed that the Legislature determined for itself that all those groups so listed by the Attorney General, whether foreign or domestic, were subversive organizations or communist fronts. To illustrate: one taking the oath swears that he is not affiliated 'with any foreign political agency' listed by [fol. 143] the Attorney General as being a communist front or subversive organization. This part of the oath does not contemplate non-membership in any organization, foreign or domestic, which does not appear on the list or lists of the Attorney General in existence at the time of the passage of the act. There is no requirement in the act that an oath be taken of non-membership in organizations not on the list of the Attorney General of the United States at the time of the passage of this act."

In so holding, the Court wholly overlooked the following question, decisive of the case. In so construing the Act and the Oath, employment of, or payment of compensation to, persons in the same class as all petitioners (employees of Oklahoma Agricultural and Mechanical College), who at the time the Act was passed belonged to an agency, party, association or group so determined to be Communist front or subversive after the effective date of the Act, are not proscribed by the Act and the Oath. The Act and the Oath, so construed, deny to petitioners the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. The denial occurs because under the Act petitioners suffer loss of compensation and forfeiture of contracts of employment if they fail to foreswear membership in organizations proscribed prior to the effective date of the Act, while others [fol. 144] in the same class may continue their employment and continue to receive compensation under their contracts of employment because they are not required by law to for-

swear membership in organizations proscribed after the effective date of the Act.

In this connection, the Court held:

> "The real design and purpose of the Legislature in the enactment of House Bill No. 8 is not difficult to ascertain. The real purpose of the Legislature was to make loyalty a qualification to hold public office or be employed by the State."

The distinction and the classification thus made, using the effective date of the Act as a dividing line, bear no reasonable relation to the purpose of the Act as announced by the Court.

6. The Court in its decision held:

> "That part of the oath that says 'within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, * * *' refers to the same organizations listed by the Attorney General and in existence at the time of the passage of the Act. It has no reference to organizations that may have been added by the Attorney General after the passage of the act and up to the time of the taking of the oath. The oath under this [fol. 145] phrase is to the effect that affiant has not been a member of any of the organizations so listed by the Attorney General within the five-year period previous to the taking of the oath."

The Court, in so holding, wholly overlooked the following question, decisive of the case. In so construing the Act and the Oath, employment of, and payment of compensation to, persons in the same class as all petitioners (employees of Oklahoma Agricultural and Mechanical College), who at the time of the enactment of the Act belonged to an agency, party, organization or group so determined to be Communist front or subversive after the effective date of the Act, are not proscribed by the Act and the Oath. The Act and the Oath, so construed deny to petitioners the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. The denial occurs because under the Act petitioners suffer loss of compensa-

fion and forfeiture of contracts of employment if they refuse to forswear membership in organizations proscribed prior to the effective date of the Act, while others in the same class may continue receiving compensation under contracts of employment because they are not required by law to forswear membership in organizations proscribed after the effective date of the Act.

In determining the purpose of the Act, the Court said:

> "The real design and purpose of the Legislature in [fol. 146] the enactment of House Bill No. 8 is not difficult to ascertain. The real purpose of the Legislature was to make loyalty a qualification to hold public office or be employed by the State."

The distinction and the classification thus made, using the effective date of the Act as a dividing line, bear no reasonable relation to the purpose of the Act as announced by the Court.

7. The Court wholly overlooked extending to petitioners the privilege of taking the Oath as construed by the Court, when it said:

> "Before going further into a specific discussion of alleged invalidity for certain stated reasons the apparent confusion as to the interpretation to be given the parts of the oath required should be dispelled. The phrase of the oath which refers to affiliation 'with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization' refers to a list or lists of such organizations in existence at the time of the passage of the act which had been prepared by the Attorney General under Governmental [fol. 147] directive. Such list or lists are in effect made a part of the oath by reference. It must be assumed they are readily obtainable. Nothing appears to the contrary. There was no attempt on the part of the Legislature to confer authority, judicial or otherwise, upon the Attorney General in the preparation of said

list or lists. It also must be assumed that the Legislature determined for itself that all those groups so listed by the Attorney General, whether foreign or domestic, were subversive organizations or communist fronts. To illustrate: one taking the oath swears that he is not affiliated 'with any foreign political agency' listed by the Attorney General as being a communist front or subversive organization. This part of the oath does not contemplate non-membership in any organization, foreign or domestic, which does not appear on the list or lists of the Attorney General in existence at the time of the passage of the act. There is no requirement in the act that an oath be taken of non-membership in organizations not on the list of the Attorney General of the United States at the time of the passage of this act.

"That part of the oath 'that I will take up arms in defense of the United States in time of War or National Emergency, if necessary' means that the affiant will take up arms in time of War or National Emergency if by law required.

[fol. 148] "That part of the oath that says 'that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, * * *' refers to the same organizations listed by the Attorney General and in existence at the time of the passage of the Act. It has no reference to organizations that may have been added by the Attorney General after the passage of the act and up to the time of the taking of the oath. The oath under this phrase is to the effect that affiant has not been a member of any of the organizations so listed by the Attorney General within the five-year period previous to the taking of the oath."

Petitioners had no way of knowing that the words, "within the five (5) years immediately preceding the taking of this oath," meant "within five (5) years immediately preceding the passage of the Act." Petitioners had no way of knowing this especially in view of the fact that, under Section 1, persons holding public employment had

thirty days after the effective date of the Act within which to take the Oath.

[fol. 149] In *Garner v. City of Los Angeles*, 71 S. Ct. 909, decided June 4, 1951, and cited by this Court in support of its holding on the bill of attainder issue, the Supreme Court of the United States said:

> "We assume that if our interpretation of the oath is correct, the City of Los Angeles will give those petitioners who heretofore refused to take the oath an opportunity to take it as interpreted, and resume their employment."

The failure of the Court to extend this privilege antecedently to, or as a condition precedent to, a denial of relief to petitioners in respect of their contracts of employment and the right to receive compensation thereunder, denies to petitioners life, liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

8. The Court, in construing the Act and the Oath, wholly overlooked a question decisive of the case, that is, the Act and the requirements of the Oath, applied to petitioners, as construed by the Court, constitute a bill of attainder in violation of Article I, Section 10 of the Constitution of the United States, because the Act required a forfeiture of petitioners' contracts of employment in effect when the Act was passed, and a denial of compensation due thereunder, for failure to forswear membership in organizations, which memberships were lawful at the time the contracts of employment were entered into.

In applying *Garner* v. *City of Los Angeles*, supra, the Court wholly overlooked the real distinction which consti- [fol. 150] tuted the basis of the holding in that case by the Supreme Court of the United States. In the *Garner* case the contracts of employment occurred after the enactment of the law by the State of California. The distinction overlooked by the Supreme Court is clearly set forth in the opinion of the United States Supreme Court, as follows:

> "The activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over seven years before,

and two years prior to the period embraced in the oath. Not the law but the fact was posterior."

As applied to petitioners in this case, it is the law that is posterior to the fact—a complete reversal of the circumstances upon which the holding of the Supreme Court of the United States was grounded in *Garner* v. *City of Los Angeles*, supra.

In deciding that the Act and the requirements of the Oath did not constitute a bill of attainder, in violation of Article I, Section 10 of the Constitution of the United States, because no punishment was involved, the Court wholly overlooked the holding of the Supreme Court of the United States in *United States* v. *Lovett*, 66 S. Ct. 1073, wherein the Supreme Court in the following language held that a denial of compensation constituted the requisite punishment to classify the Act of Congress involved as a bill of attainder:

> "The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. * * * The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a State or by the United States."

[fol. 151] 9. The Court wholly overlooked the proposition, as urged under item 6 of the third proposition in petitioners' brief, that the vices in a state statute, which render the statute obnoxious as a bill of attainder, also render it effective to take life, liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

10. In holding that the Act and the requirements of the Oath do not impair the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States, the Court wholly overlooked the necessary operation and effect of the Act in bearing directly on contractual

relations by declaring a legislature forfeiture thereof for failure to take an oath not required by law at the time the contracts of employment were entered into. In this connection, the Court wholly overlooked its own holding in *Roth* v. *Waterfield*, 167 Okl. 209, 20 P. 2d 24, wherein the Court said:

> "In such cases due process and equal protection of the laws would seem to require compensation and protection."

In this connection, the Court held:

> "The statute and the required loyalty oath do not deprive public officials and employees of property or liberty without due process of law. The intervenors are employees of the State as teachers in a public institution. They have no constitutional right to be so employed. They have no right to so serve the state except upon such terms as the state prescribes. The act does not purport to take away their right to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them. People *v.* Crane, 214 N. Y. 154, 108 N.E. 427, L.R.A. 1916D 550; Heim *v.* McCall, 239 U. S. 175, 60 L. Ed. 207, 36 Sup. Ct. 78; Ellis *v.* U. S., 206 U. S. 246, 51 L. Ed. 1047, 27 [fol. 152] Sup. Ct. 600; McAuliffe *v.* Mayer, etc., City of New Bedford, 155 Mass. 216, 29 N.E. 517."

The Court wholly overlooked that the cases it cites are applicable only to contracts entered into after the enactment of a law or laws pertaining to the subject-matter thereof, and that none of the cited cases hold that a public employee, once protected by a valid contract of employment, may be discharged if such an employee refuses to yield to new and additional terms suitable to the public agency, during the term of a contract which does not contain such terms.

In so holding, the Court wholly overlooked the holding of the United States Supreme Court in *State* v. *Brand*, 58 S. Ct. 443, wherein it held that the State of Indiana impaired the obligation of contract by repealing a tenure

statute construed to be a part of, and implicit in, a teacher's prior contract of employment. It was there held that a state, by inducing teachers to accept contracts of employment under a statute which gave them tenure, could not later, as to persons so induced, repeal the tenure policy of the state.

II. The Court wholly overlooked, in deciding that the Act and the requirements of the Oath thereunder did not take property without due process of law, that the language of the Oath was so indefinite and ambiguous that men of common understanding must guess at the meaning of the Oath. For example, men of common understanding could only guess, and in fact, could only make a very long guess, that the language of the Oath, "within five (*f*) years immediately preceding the taking of this oath," meant "within five (5) years immediately preceding the passage [fol. 153] of this Act."

12. The Court wholly overlooked that, giving to the Oath the meaning which the Court gave in its opinion, persons required to know could not be expected to know what organizations, agencies, parties and associations had been officially determined to be Communist and subversive prior to the passage of the Act. The Act provided no machinery for supplying this knowledge.

In this connection the Court, in holding "it must be assumed they (lists of subversive organizations) are readily obtainable," acted contrary to its judicial knowledge that in the highways and byways of Oklahoma, where in the act and the Oath are applicable, such lists are not readily obtainable. The Act, in failing to provide machinery for supplying persons required to take the Oath, including petitioners, with information as to the contents of such lists, denied life, liberty and property without due process of law, under the Fourteenth Amendment to the Constitution of the United States, by requiring petitioners to swear to something they could not be expected to know.

13. The Court wholly overlooked that a violation of the constitutional rights of petitioners, as set forth in their assignments of error, was not only asserted in intervenors' petition for mandatory injunction, but was asserted as well in intervenors' answer to the plaintiffs' petition in the Trial

Court for an injunction against the payment of petitioners' compensation. And in this connection, the Court wholly overlooked either affirming or reversing the judgment of [fol. 154] the Trial Court, as set forth in the Court's opinion to the effect that, "It is therefore ordered, adjudged and decreed by the Court that the injunction should be made permanent in all things as set forth in the Conclusions of Law." And in this connection, the Court wholly overlooked that this aspect of the judgment of the Trial Court violated the constitutional rights of petitioners without regard to the denial of the petition for mandatory injunction, as asserted in the consolidated petition for intervention, the exceptions to the judgment of the Trial Court, the petitioners' motion for a new trial, the petitioners' assignments of error, and the presentation of the assignments of error under appropriate propositions of law in the petitioners' brief.

Part II

Petitioners Baum, Lee, Correll, Schmoe and Nietz state the following as their grounds of complaint and as reasons for a rehearing, in addition to those asserted by all petitioners under Part I:

1. The Court wholly overlooked an issue decisive of the case as to said petitioners, namely, the enactment by the Congress of the United States of a complete, comprehensive and fully integrated scheme, in the exercise of its power under Article I, Section 8 of the Constitution of the United States, to raise an army and provide a navy and organize and discipline a militia; that in exercising such power the Congress enacted the Selective Service Act of 1948, [fol. 155] U.S.C.A. 1951, Supplementary Pamphlet Title 50, Sec. 451, et seq., providing that:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." (Sec. 456(j).)

The Court overlooked the fact that, the Congress in the exercise of such power having decided to exempt persons

opposed to participation in war by virtue of religious training and belief, the requirement of the Oath that one swear to take up arms in defense of the United States in time of war or national emergency, if necessary, is an unconstitutional invasion of the exclusive power of the Congress under said Article I, Section 8, and that a decision of the United States Supreme Court is decisive of that issue, namely, *Hines, Secretary of Labor & Industry of Pa., et al.* v. *Davidowitz, et al.*, 61 S. Ct. 399.

2. The Court, in holding that the requirement of the Oath that one take up arms in defense of the United States did not invade the constitutional rights of petitioners, protected by the First Amendment to the Constitution of the United States, overlooked that intervenors did not assert that the Oath and the Act violated the First Amendment to the Federal Constitution. The First Amendment to the Federal Constitution inhibits only conduct of the Congress. It was the freedom of belief and practice, implicitly protected in [fol. 156] the due process clause of the Fourteenth Amendment to the Constitution of the United States, that petitioners assert a violation of, in requiring that one take an oath to bear arms contrary to his religious belief.

In this same connection, the Court overlooked entirely the holding and application, decisive of this case, by the Supreme Court of the United States in *Cantwell, et al.* v. *State of Connecticut*, 60 S. Ct. 900. While in that case the Supreme Court of the United States recognized that freedom to act on religious grounds is subject to regulation for the protection of society, it held that it is only when the threatened religious act creates a clear and present danger that suppression of the threatened action is justified.

The Court overlooked the decisive application of *West Virginia Board of Education, et al.* v. *Barnette, et al.*, 63 S. Ct. 1178, cited on page 88 of petitioners' brief. In that case the Supreme Court of the United States held that a refusal to salute the flag did not create any clear and present danger by compelling one to utter something that was not in his mind. The Court, in holding that relegious practice, although in conformity with religious belief, may be interfered with where such practice is in violation of law, wholly overlooked the constitutional requirement that it is

only when such religious practice creates a clear and present danger that its frustration is justified under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 157] Additionally, in this connection, the Court wholly overlooked that the petitioners were not seeking to engage in any conduct. They wished simply to remain silent and inactive. Their refusal to take the Oath to bear arms in defense of the United States must be held to create a clear and present danger, which the taking of the Oath will be calculated to prevent, in order to justify this requirement of the Oath under the due process clause of the Constitution of the United States.

III

Petitioner Aboulghassem Zirakzadeh states the following as his grounds of complaint and as reasons for a rehearing, in addition to those asserted by all petitioners under Part I:

1. The Court wholly overlooked a question decisive of the case, namely, that the construction of the Act and the Oath given by the Court, as applied to Aboulghassem Ziraksadeh, a foreign national, in the respect hereinafter set forth, rendered the Act and the Oath as to him, as of the time he was required to take the Oath, so vague that men of common intelligence must guess at its meaning and differ as to its applications, and in this connection, the Court wholly overlooked that the Act and the Oath denied life, liberty and property without due process of law by denying compensation lawfully due and by forfeiting his contract of employment for failure to take the Oath. The construction of the Oath hereinabove immediately reffered to:

> [fol. 158] "He is also under the misapprehension that the requirement of the oath that 'I will take up arms in defense of the United States in time of War or National Emergency, if necessary' constitutes an assertion or oath by him that he would take up arms against the government of which he is a citizen. This part of the oath does not include or refer to a resident alien's native country which he is a citizen. This conclusion is inescapable in recognition of the reasonableness and fairness of the Legislature. This interpretation will no

doubt dispel any fears in the mind of such friendly alien. The Legislature did not intend to require as a condition precedent to employment by the State that one take an oath that in case of war he would bear arms against his native land."

The construction referred to immediately above is especially vague because earlier in the opinion the Court said:

"That part of the oath 'that I will take up arms in defense of the United States in time of War or National Emergency, if necessary,' means that the affiant will take up arms in time of War or National Emergency if by law required."

This places the petitioner, Aboulghassem Zirakzadeh, as a person of common intelligence, in the position of not knowing whether the part of the Oath under consideration means that in no event will he be required to bear arms against his native land, or whether the Oath requires that he must surely bear arms against his native land if the Congress by law requires that all foreign nationals do so.

2. The Court, in construing that part of the Oath referring to the defense of the United States, as it applied to a foreign national, held to the following effect in the following language:

"He is also under the misapprehension that the requirement of the oath that 'I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary' constitutes an assertion or oath by him that he would take up arms against the government of which he is a citizen. This part of [fol. 159] the oath does not include or refer to a resident alien's native country of which he is a citizen. This conclusion is inescapable in recognition of the reasonableness and fairness of the Legislature. This interpretation will no doubt dispel any fears in the mind of such friendly alien. The Legislature did not intend to require as a condition precedent to employment by the State that one take an oath that in case of war he would bear arms against his native land."

In so holding, the Court overlooked that the Congress had enacted a complete, comprehensive and fully integrated scheme, in the exercise of its power under Article I, Section 8 of the Constitution of the United States, to raise an army and provide a navy and organize and discipline a militia, and that in the exercise of such power provided:

> "Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." Title 50, A.P.P. 454, U.S.C.A. 1951, Supplementary Pamphlet p. 108.

The Court overlooked the fact, in holding that the requirements of the Oath did not mean that a foreign national is required to take up arms against his native country, that such construction of the Act and the Oath was in conflict with the above quoted section of the Selective Service Act adopted by the Congress June 24, 1948, Title I, 62 Stats. 604.

Additionally, in this same connection, the Court overlooked the fact that the Act and the Oath, so conflicting with the Selective Service Act of the Congress, and having dealt with the identical subject matter dealt with by the Congress in said Selective Service Act, constitute, with [fol. 160] respect to petitioners, an unconstitutional exercise of powers delegated exclusively to the Congress under said Article I, Section 8 of the Constitution of the United States, authorizing the Congress to set and determine the policies implicit in raising an army, providing a navy, and organizing and disciplining a militia.

3. The Court wholly overlooked considering and passing upon the following constitutional issue, properly and timely raised in the Trial Court by consolidated petition in intervention and by motion for a new trial and by exceptions to the Trial Court's judgment, and in the Supreme Court by

assignments of error and the assertion of appropriate propositions of law in petitioners' brief. Such issue, to which the Court overlooked giving consideration, embraced provisions of both the Constitution of the State of Oklahoma and the Constitution of the United States, as follows:

> That the Act and the requirements of the Oath as to petitioner Aboulghassem Zirakzadeh invade the exclusive power of the Congress to regulate commerce among foreign nations, in violation of Article II, Section 8 of the Constitution of the United States.

Wherefore, premises considered, these petitioners, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, Luella Nietz, and Aboulghassem Zirakzadeh, pray that they, and each of them, be granted a petition for a rehearing [fols. 161-162] herein, and that upon the hearing thereof this Court withdraw its prior decision and enter a decision reversing the judgment of the Trial Court, in which a judgment was rendered enjoining payment of petitioners' compensation under validly existing contracts of employment, and render a judgment in favor of each petitioner, requiring that everything necessary be done to effect payment to each petitioner under his contract of employment with the Board of Regents of Oklahoma Agricultural Colleges.

Because of the importance of the decision in these cases, both to these petitioners and to all concerned, and because of its importance as a precedent in other cases, petitioners further pray that their petition for rehearing, and the Court's further consideration thereof, be set for oral argument.

> Respectfully submitted, Don Emery, Robert J. Emery, Emery & Emery. By (Signed) Don Emery, Attorneys for Petitioners, 462 First National Building, Oklahoma City, Oklahoma.

Proof of Service (omitted in printing).

[fol. 163] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PRAECIPE—Filed January 24, 1952

To the Clerk of the Supreme Court of the State of Oklahoma:

You will please prepare a transcript of the record in the above entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

[fol. 164] 1. Petition (C. M. 7-9).
2. Order Granting Intervenors Permission to File Consolidated Petition (C. M. 30-31).
3. Consolidated Petition in Intervention and Cross-Petition (C. M. 33-46).
4. Answer (C. M. 60-62).
5. Answer to Cross-Petition of Intervenors (C. M. 63-65).
6. Answer to Plea of Intervention (C. M. 66-68).
7. Reply (C. M. 69-71).
8. Stipulations of Counsel in Open Court (C. M. 72-77).
9. Written Stipulation without Exhibits (C. M. 86-90).
10. Intervenors' Motion for New Trial (C. M. 216-225).
11. Order Overruling Motion of Intervenors for New Trial (C. M. 226-228).
12. Journal Entry of Judgment (C. M. 235-246).
13. Notice of Intention to Appeal (C. M. 246A).
14. Certificate of Trial Judge (C. M. 255-256).
15. Petition in Error of Intervenors Robert M. Wieman and Nancy Kent Ziebur.
16. Petition in Error of Intervenors Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Luella R. Nietz.
[fol. 165] 17. Opinion of the Supreme Court of the State of Oklahoma in No. 35160 on the Docket of Said Court.
18. Motion for Rehearing.
19. Order Overruling Motion for Rehearing.
20. Petition for Appeal.

21. Order Allowing Appeal.
22. Citation on Appeal.
23. Assignment of Errors.
24. Statement of Jurisdiction of the Supreme Court of the United States.
25. Statement of Appellants Directing Attention to Paragraph 3 of Rule 12 of Revised Rules of the Supreme Court of the United States.
26. Certificate of Service of Notice of Appeal.
27. This Praecipe.

Dated: January 24, 1952.

H. D. Emery, Counsel for Appellants, Robert M. Wyeman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Luella Nietz.

[fol. 166] Acknowledgment of Service (omitted in printing).

[fols. 167-225] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed January 18, 1952

Appellants, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Luella Nietz, and each of them, called intervenors, plaintiffs in error in the Supreme Court of the [fol. 226] State of Oklahoma, complain of the judgment rendered by said court in the above styled cause on October 18, 1951, then pending on the docket of said court, and assign as grounds for reversal the following errors in the record, proceedings and judgment in said cause:

Assignment of Errors

1. The Supreme Court of the State of Oklahoma erred in failing to hold that a statute of the State of Oklahoma,

namely, enrolled House Bill No. 8, 23rd Legislature (Laws 1951; 51 O. S. 1941 (Supp.) 37.1-37.8), violated the constitutional rights of each of the appellants, which statute prohibited payment of accrued salaries to each plaintiff in error due under a valid contract of employment entered into prior to the enactment of said statute, and forefeited said contract of employment without judicial trial for failure of each petitioner to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other [fol. 227] things, is to the effect that each petitioner swear that at any time within five years immediately preceding the enactment of said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General of other authorized agency to be a Communist front or subversive organization, in that the operation and effect of said statute as set forth above impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States providing that no state shall pass any law impairing the obligation of contracts.

2. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each plaintiff in error, which statute prohibited payment of accrued salaries to each plaintiff in error due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of [fol. 228] employment without judicial trial for failure of each petitioner to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each petitioner swear that at any time within five years immediately preceding the enactment of the said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a Communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment, of each appellant, thus constituting said stat-

ute a bill of attainder, contrary to Article I, Section 10 of the Constitution of the United States providing that no state shall pass a bill of attainder.

3. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional [fol. 229] rights of each plaintiff in error, which statute prohibited payment of accrued salaries to each plaintiff in error due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each petitioner to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each petitioner swear that at any time within five years immediately preceding the enactment of the said statute he had not been a member of any agency, party, organization, association or group whatever which — been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a Communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment, of each appellant, thus depriving each appellant of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States providing that no state shall deprive any person of life, liberty or property without due process of law.

[fol. 230] 4. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each plaintiff in error, which statute prohibited payment of accrued salaries to each plaintiff in error due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each petitioner to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each petitioner swear that at any time within five years immediately preceding the enactment of said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said

statute, by the United States Attorney General or other authorized agency to be a Communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employ-
[fol. 231] ment, of each appellant, thus having no reasonable relation to the purpose of said statute and thus depriving each appellant of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States providing that no state shall deprive any person of life, liberty or property without due process of law.

5. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each plaintiff in error, which statute prohibited payment of accrued salaries to each plaintiff in error due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each petitioner to subscribe and file with designated authorities the Oath required by said statute which, among other things, required that each petitioner swear that he "will take up arms in defense of the United States in time of war or national emergency, if necessary," (If necessary was construed by [fol. 232] said court to mean "if by valid law required.") in that the operation and effect of said statute as set forth above violates Article I, Section 8 of the Constitution of the United States, delegating exclusively to the Congress of the power to raise and support armies and provide and maintain the navy, by interfering with the enforcement of a complete, comprehensive and fully integrated scheme enacted by the Congress as the Selective Service Act of 1948, and in effect at the time of the enactment of said statute.

6. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each plaintiff in error, which statute prohibited payment of accrued salaries to each plaintiff in error due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each petitioner to subscribe and file with designated authorities the

Oath required by said statute, which Oath is so vague that men of common intelligence must guess at its meaning and differ as to its application, thus rendering the operation and effect of said statute as set forth above a deprivation of [fol. 233] liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law. The respects in which the Oath is vague appear, by virtue of the construction of the language of the Oath by the Supreme Court of Oklahoma in its said judgment and decision, as follows:

(a) By construing that "I am not affiliated directly or indirectly with . . . any foreign political agency, party, organization or government" as meaning any foreign political agency, party, organization or government officially determined by the United States Attorney General or other authorized agency of the United States to be a Communist front or subversive organization.

(b) By construing the language of the Oath, "that I am not affiliated directly or indirectly with" to mean "that I am not affiliated directly or indirectly with at the time of the passage of the Act."

[fol. 234] (c) By construing the language of the Oath, "that within five (5) years immediately preceding the taking of the oath I have not been a member," to mean within the five years immediately preceding the passage of the Act, without regard to when the Oath is taken.

(d) The language of the Oath, "that I will take up arms in defense of the United States in time of war or national emergency if necessary," means in respect of the words "if necessary," if valid law required.

7. The Supreme Court of Oklahoma committed error in failing to extend to each petitioner, as a condition precedent to its affirmance of the judgment of the District Court of Oklahoma, the privilege of taking the Oath in the light of its construction of said statute as set forth in Assignment of Error No. 6. That such error constituted a violation of the

constitutional rights of each appellant by taking his liberty [fol. 235] and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

8. The Supreme Court of the State of Oklahoma erred in failing to hold said statute violated the constitutional rights of plaintiffs in error Lee, Correll, Nietz, Schmoe and Baum, each holding sincere religious conviction opposing the bearing of arms against his fellow man, which statute prohibited payment of accrued salaries to each of said plaintiffs in error, due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each of said plaintiffs in error to subscribe and file the Oath with designated authorities required by said statute, which oath, among other things, is to the effect that each said petitioners swears that he will ~~take up arms in~~ defense of the United States in time of war or national emergency, if necessary, in that the operation and effect of said statute, as set forth above, constitutes a law respecting the free exercise [fol. 236] of religion, contrary to the Fourteenth Amendment to the Constitution of the United States providing that no state shall deprive any person of life, liberty or property without due process of law.

For which said errors each appellant, namely, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A Schmoe, and Luella Nietz prays that said judgment and decision of the Supreme Court of the State of Oklahoma in the above styled cause dated October 18, 1951, be reversed, and that a judgment be entered holding invalid said statute of the State of Oklahoma, namely, enrolled House Bill No. 8, 23rd Legislature (Laws 1951; 51 O. S. 1941 (Supp.) 37.1-37.8), and that the Supreme Court of Oklahoma be directed to issue a mandatory injunction directed to the Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, requiring them, and each of them, to make payment of accrued salaries due under their contracts of employment with the Board of Regents of the Oklahoma Agricultural Col-

leges, and that the appellants, and each of them, be awarded their costs.

[fol. 237] Dated this 18th day of January, 1952.

Emery & Emery, H. D. (Don) Emery, Robert J. Emery, Attorneys for Appellants, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Luella Nietz.

[fols. 238-240] Statement required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing).

[fols. 241-250] Bond on Appeal for $250.00 approved and filed January 31, 1952, omitted in printing.

[fol. 251] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR APPEAL—Filed January 18, 1952

To the Honorable Ben Arnold, Chief Justice of the Supreme Court of the State of Oklahoma:

Come now the petitioners Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Luella Nietz, and each of them, intervenors, plaintiffs in error, in the above entitled [fol. 252] cause, by their attorneys, and respectfully show:

1. The Supreme Court of the State of Oklahoma, the highest court of said state, on October 18, 1951, in the above styled cause rendered against these petitioners, and each of them, a judgment and opinion, as the case may be, affirming a judgment of the District Court of Oklahoma County, Oklahoma, "that intervenors' [these petitioners] petition

for mandatory injunction is in all things denied and costs are affixed against the defendants and intervenors. Exceptions allowed to all parties." These petitioners, and each of them, by cross-petition sought a mandatory injunction against the Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma (who were also plaintiffs in error), to compel said parties, and each of them, to do everything necessary to make payment and to make payment to these [fol. 253] petitioners of accrued salaries due under a valid and subsisting contract in effect between each of these petitioners and the said Board of Regents. This cross action was filed in an action instituted by Paul W. Updegraff, defendant in error, seeking to enjoin the payment of compensation to all employees of the said Board of Regents, including these petitioners, who failed to subscribe to and file the Loyalty Oath prescribed by enrolled House Bill No. 8 23rd Legislature (Laws 1951; 51 O. S. 1941 (Supp.) 37.1-37.8). The Supreme Court of the State of Oklahoma, in its judgment and opinion declared, "only those propositions asserted which are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors [these petitioners] will be discussed." The parties above named as plaintiffs in error, including these petitioners, are all the parties appearing in person or by counsel in said cause, other than Paul W. Updegraff, defendant in error, and Aboulghassem Zirakzadeh, intervenor, plaintiff in error, who does not choose to appeal to the Supreme Court of the United States.

[fol. 254] 2. Each of petitioners, at the time of the institution of this action by defendant in error, Paul W. Updegraff, was rendering service to Oklahoma Agricultural and Mechanical College in Stillwater, Oklahoma, in the following capacity: Robert M. Wieman was Assistant Professor of Philosophy; Nancy Kent Ziebur was Research Assistant for Research Foundation; Werner C. Baum was Assistant Professor of Botany; Samuel Hunt Lee, Jr. was Associate Professor of Chemistry; Malcolm Correll was Professor of Physics and Chairman of Physical Science; Lillian A. Schmoe was a Secretary; and Luella Nietz was Assistant

Professor of Music. Said college is governed by said Board of Regents.

3. On the 1st day of November, 1951, being within the time allowed under the applicable rule of the Supreme Court of Oklahoma (Rule 28 Rehearings), petitioners, and each of them, filed their petitions for rehearing with said court, which said petit-ons, and each of them, were denied by order of said court dated November 6, 1951, by reason [fol. 255] whereof said judgment of the District Court of Oklahoma County and said judgment of the Supreme Court of Oklahoma will become final as to each of petitioners, unless the petitioners, and each of them, are allowed an appeal to the Supreme Court of the United States.

4. In the record and proceedings and in the rendition of said judgment by the District Court of Oklahoma County, Oklahoma, and in the rendition of said judgment by the Supreme Court of the State of Oklahoma, there was drawn in question by petitioners, and each of them, the validity of a statute of the State of Oklahoma (enrolled House Bill No. 8, 23rd Legislature (Laws 1951; 51 O. S. 1941 (Supp.) 37.1-37.8), and each word, phrase, clause, sentence or other portion thereof, on the ground that as to petitioners, and each of them, said statute, *and each of them, said statute,* and each word, phrase, clause, sentence or other portion thereof, are in contravention of Article I, Section 10, as constituting a law impairing the obligation of contract and as constituting a bill of attainder, and on the [fol. 256] ground that said statute, and each word, phrase, clause, sentence or other portion thereof, are in contravention to the Fourteenth Amendment to the Constitution of the United States, by taking life, liberty and property of petitioners, and each of them, without due process of law, and by denying to petitioners, and each of them, the equal protection of the laws. The judgment of the District Court of Oklahoma County, Oklahoma, and the judgment of the Supreme Court of the State of Oklahoma were in favor of the validity of said statute, and each word, phrase, clause, sentence or other portion thereof.

5. If said judgment of the District Court of Oklahoma County and the judgment of the Supreme Court of the State of *the state of* Oklahoma are permitted to become final,

manifest error will occur, greatly to the damage of petitioners, and each of them. The facts in such regard, as disclosed by the record, are as follows: These petitioners, and each of them, during the term of their contracts with said Board of Regents to serve Oklahoma Agricultural and Mechanical College, are denied compensation provided therein and due thereunder for services performed and to be performed pursuant thereto.

[fol. 257] 6. The errors upon which petitioners claim to be entitled to an appeal are more fully stated and set out in their assignments of error and statement of jurisdiction filed herewith.

Wherefore, petitioners, and each of them, pray for allowance of appeal from the Supreme Court of the State of Oklahoma, the highest court of said state, to the Supreme Court of the United States, in order that the said judgment and decision of the Supreme Court of the State of Oklahoma may be examined and reversed; and petitioners, and each of them, also pray that a transcript of the record, proceedings and papers in said cause No. 35160 in the Supreme Court of the State of Oklahoma, duly authenticated by the Clerk of the Supreme Court of the State of Oklahoma, may be sent to the Supreme Court of the United States, as provided by law; that citation be issued in accordance with law; that an order be made with respect to the appeal bond be given by petitioners, and each of them; that the amount of security be fixed by the order allowing the appeal.

[fol. 258] Dated, this 18th day of January, 1952.

Respectfully submitted, Emery & Emery, H. D. (Don) Emery, Robert J. Emery, Attorneys for Petitioners Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Luella Nietz.

[fol. 259] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 18, 1952

It appearing to the undersigned, the Chief Justice of the Supreme Court of the State of Oklahoma, that intervenors, [fol. 260] plaintiffs in error in the above captioned cause, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Luella Nietz, hereinafter called "appellants," have filed their petition for appeal with assignment of errors to the Supreme Court of the United States, and also their statement as to the jurisdiction of the Supreme Court of the United States, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment, decree and decision of the Supreme Court of Oklahoma in the above entitled cause;

Now, therefore, the premises considered, it is ordered that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the judgment, decree and decision rendered in this cause on October 18, 1951, and made final by denial of petition for rehearing by order of the Supreme Court of Oklahoma entered and effective November 6, 1951.

[fol. 261] It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00 with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that the Clerk of the Supreme Court of the State of Oklahoma shall, within the time and as required by law, prepare, certify and transmit under his hand and the seal of the Supreme Court of the State of Oklahoma to the Clerk of the United States Supreme Court a transcript of the record herein, containing a true copy of all material parts of said record, which shall be designated by praecipe filed with him by any of the parties to said appeal.

It is further ordered that citation shall issue in accordance with law.

Dated this 18th day of January, 1952.

[fol. 262] Ben Arnold, Chief Justice of the Supreme Court of the State of Oklahoma.

[fols. 263-264] Citation in usual form showing service on Paul W. Updegraff omitted in printing.

[fol. 265] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 266] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed February 16, 1952

a. Appellants adopt for their statement of points upon which they intend to rely in their appeal to this Court the points contained in their Assignment of Errors heretofore filed.

b. Appellants designate the entire record, as filed in the above-entitled case, for printing by the Clerk of this Court.

H. D. Emery, Counsel for Appellants.

[fols. 267-268] Acknowledgment of Service

The undersigned, Attorney General of the State of Oklahoma, attorney for A. S. J. Shaw, State Treasurer of the State of Oklahoma, Wilburn C. Cartwright, State Auditor of the State of Oklahoma, and The Board of Regents of The Oklahoma Agricultural Colleges, hereby acknowledges that on February 13, 1952, he was served with a copy

of the foregoing Statement of Points to be Relied upon and Designation of Parts of the Record to be Printed.

Mac I. Williamson, Atty. Gen. of Okla.; Fred Hansen, 1st Asst. Atty. Gen.

Proof of Service

I, H. D. Emery, counsel for appellants, hereby certify that on the 13th day of February, 1952, I mailed a true and correct copy of the foregoing Statement of Points to be Relied upon and Designation of Parts of the Record to be Printed, by registered mail, with postage prepaid and properly addressed, to Paul W. Updegraff, Appellee, Norman, Oklahoma.

H. D. Emery, Counsel for Appellants.

Acknowledgment of Service

The undersigned Appellee hereby acknowledges that on February —, 1952, he was served with a copy of the foregoing Statement of Points to be Relied upon and Designation of Parts of the Record to be Printed.

Paul W. Updegraff, Appellee.

[fol. 269] Supreme Court of the United States, October Term, 1951

[Title omitted]

Order—March 10, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Office - Supreme Court, U. S.
FILED
FEB 16 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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No. 590

ROBERT M. WIEMAN, NANCY KENT ~~ZIESBUR~~, WERNER C. BAUM, SAMUEL HUNT LEE, JR., MALCOLM CORRELL, LILLIAN A. SCHMOE, AND LUELLA NIETZ,

Appellants,

vs.

PAUL W. UPDEGRAFF, THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION

H. D. (DON) EMERY,
ROBERT J. EMERY,
Counsel for Appellants.

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 35160

THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA,

also *Plaintiffs in Error*

ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, SAMUEL HUNT LEE, JR., MALCOLM CORRELL, LILLIAN A. SCHMOE, LUELLA NIETZ AND ABOULGHASSEM ZIRAK-ZADEH,

Intervenors, Plaintiffs in Error

vs.

PAUL W. UPDEGRAFF,

Defendant in Error

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Luella Nietz,

intervenors, plaintiffs in error in the Supreme Court o Oklahoma, hereinafter called "appellants," submit here with their statement particularly disclosing the basis upo which the Supreme Court has jurisdiction on appeal t review the judgment of the Supreme Court of the State o Oklahoma, entered in this cause.

I

Opinion Below

The decision and opinion of the Supreme Court of the State of Oklahoma is reported in 237 P. (2d) 131. The decision and opinion has not yet been published in the official Oklahoma Reports.

II

Jurisdiction

The judgment of the Supreme Court of Oklahoma was entered October 18, 1951. Appellants' petition for rehearing was timely filed in the Supreme Court of the State of Oklahoma November 1, 1951, and was denied by said court November 6, 1951. A petition for appeal is presented to the Supreme Court of the State of Oklahoma herewith, to wit, on January 18, 1952, and allowed by said court January 18th, 1952, within ninety days after said judgment and decision became final (Sec. 2101, Title 28 United States Code Revised).

III

Basis of Jurisdiction of the Supreme Court of the United States

The final judgment and decision of the Supreme Court of the State of Oklahoma upheld as valid a statute of the

State of Oklahoma which denied accrued compensation to appellants under a valid contract of employment with the Board of Regents of the Oklahoma Agricultural Colleges for services to be performed at Oklahoma Agricultural and Mechanical College, Stillwater, Oklahoma, which contract was in effect at the time the said statute was enacted, and which statute forfeited said contract without judicial trial by reason of each appellant's failure to take and file a certain oath required by said statute.

It appears from the judgment and decision of the Supreme Court of the State of Oklahoma that said statute was drawn in question as repugnant to the Constitution of the United States and that said decision was in favor of its validity.

The Supreme Court of the State of Oklahoma, in upholding said statute, denied the specific and timely contention of appellants that said statute violated the Constitution of the United States in the following particulars:

(a) Article 1, Section 10, prohibiting a state from impairing the obligation of contracts and prohibiting a state from passing a bill of attainder;

(b) The Fourteenth Amendment, providing that no state shall deprive any person of life, liberty or property without due process of law;

(c) Article I, Section 8, delegating to the Congress the exclusive power to raise and support armies and provide and maintain a navy.

The way in which said statute was drawn in question under the Constitution of the United States, and the specific holdings as to its validity, appear below under VI, B.

IV

Statutory Provisions Believed to Sustain Jurisdiction

The statutory provision vesting the Supreme Court of the United States with jurisdiction of this appeal in Section 1257, Title 28 United States Code, Revised, the material parts of which provide:

> "Final judgment or decrees rendered by the highest court of a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

V

The Statute of the State of Oklahoma Validity of Which Is Involved

The statute involved is enrolled House Bill No. 8, 23rd Legislature (Laws 1951, 51 O. S. 1941 (Supp.) 37.1 - 37.8), and is herein set forth verbatim, as follows:

> AN ACT
>
> Enrolled House Bill No. 8—By: SHIBLEY.
>
> An act relating to public officers and public employees: Prescribing an oath or affirmation to be taken by every officer and employee of the state, county, school district, municipality, public agency, public authority, or public district: Providing for the filing of said oath or affirmation: Providing that no fee shall be charged for administering said oath: Prohibiting payment to any public officer or employee who has not

taken said oath; Providing that the taking of a false oath or affirmation shall be a felony and prescribing the penalty therefor: Providing that any public officer or employee who after taking said oath or affirmation advocates or becomes a member of an organization advocating overthrow of the United States by unlawful means shall be guilty of a felony and prescribing the penalties therefor: Repealing 51 O. S. 1941, § 32, as amended by § 1, Chapter 1, Title 51, Session Laws, 1945; and declaring an emergency.

Be it enacted by the people of the State of Oklahoma:

SECTION 1. Every officer and every employee of the State, county, school district, municipality, public agency, public authority, or public district shall within the first thirty (30) days after taking office, or within the first (30) days of such employment, take and subscribe to the oath or affirmation required by this Act. Persons now holding any such public office or public employment shall take said oath within thirty (30) days from the effective date of this Act; provided, that public officers or public employees who are on authorized leave on the thirtieth (30th) day after the effective date of this Act shall take and subscribe said oath or affirmation within thirty (30) days after returning to work or to the duties of the office held by such person. Any officer or employee of the State, county, school district, municipality, public agency, public authority, or public district who fails to take and subscribe the oath or affirmation required by this Act within the time specified in this Section, shall forfeit his or her office or employment.

SECTION 2. The oath or affirmation required by this Act shall be the following:

I, ——— ———, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that

I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means; that I am not affiliated directly or indirectly with the Communist Party, the Third Communist International, with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; nor do I advocate revolution, teach or justify a program of sabotage, force or violence, sedition or treason, against the Government of the United States or of this State; nor do I advocate directly or indirectly, teach or justify by any means whatsoever, the overthrow of the Government of the United States or of this State, or change in the form of Government thereof, by force or any unlawful means; that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, the Third Communist International, or of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization, or of any party or organization, political or otherwise, that advocated the overthrow of the Government

of the United States or of the State of Oklahoma by force or violence or other unlawful means;

(Here put name of office, or, if an employee, insert "An employee of" followed by the complete designation of the employing officer, office, agency, Authority, commission, department or institution.)

I will not advocate and that I will not become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means.

——— ———.

Subscribed and sworn to before me this the — day of ———, 19—.

———— ————,

Notary Public, or Other Officer Authorized to Administer Oaths or Affirmations.

The above provisions shall be cumulative to other requirements made by law.

Section 3. The oath or affirmation required by this Act shall be filed by the officer or employee executing it with the officer, board, authority or commission having control of the office, agency, authority, department, commission, or institution in or for which the person executing the oath or affirmation is employed or appointed or to which said person is elected; and the officer, board, authority or commission having such control shall, in the case of a state office, agency, department, authority, or institution, file same with the Secre-

tary of State, together with the oath or affirmation or oaths or affirmations of the said controlling officer, board, authority, or commission, and in the case of a county, school district, or municipal office, agency, authority, department or institution, such oaths or affirmations shall be filed by the controlling officer, board, agency, authority, of commission with the county clerk. Every such controlling officer, board, agency, authority, or commission shall keep an official record of all such oaths or affirmations received by him or it, and filed with the Secretary of State or County Clerk, as the case may be, as required by this Section.

Section 4. The oath or affirmation may be taken before any officer authorized to administer oaths or affirmations. No fee shall be charged by any person before whom the oath or affirmation is taken and subscribed.

Section 5. No compensation nor reimbursement for expenses incurred shall be paid to any public officer or employee by any public agency unless such officer or employee has taken and subscribed to the oath or affirmation required by this act. It shall be the duty of the person certifying to public pay rolls to ascertain and certify that every officer or employee thereon has taken such oath or affirmation.

Section 6. Every public officer or employee who, in taking and subscribing to the oath or affirmation required by this Act, states as true any material matter which he knows to be false, is guilty of perjury, and is punishable by imprisonment in the state prison not less than one (1) nor more than fourteen (14) years; and in addition thereto, shall forfeit any public office or employment held by such person.

Section 7. Every public officer or employee having taken and subscribed to the oath or affirmation required by this Act, who, while holding such office, or while in the employment of, or service with, the State or any county, city, school district, municipality, public agency, public authority, or public district, advocates or becomes

a member of any party or organization, political or otherwise, that advocates the overthrow of the United States or of the State of Oklahoma by force or violence or other unlawful means, is guilty of a felony and is punishable by imprisonment in the state prison not less than one (1) nor more than fourteen (14) years; and in addition thereto, shall forfeit any public office or employment held by such person.

Section 8. Section 32, Title 51, Oklahoma Statutes 1941, as amended by Section 1, Chapter 1, Title 51, Oklahoma Session Laws, 1945, is hereby repealed.

Section 9. If any provision of this Act, or any word, phrase, clause, sentence, or other portion of the oath or affirmation set out in Section 2 of this Act, or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other portions, provisions or applications of this Act, or of said oath or affirmation, which can be given effect without the invalid portion, provision or application, and to this end the provisions of this Act, and of said oath or affirmation are declared to be severable.

Section 10. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in full force from and after its passage and approval.

Passed the House of Representatives the 21st day of March, 1951.

JAMES M. BULLARD,
Speaker of the House of Representatives.

Passed the Senate the 15th day of March, 1951.

JAMES E. BERRY,
President of the Senate.

Approved by the Governor of the State of Oklahoma the 9th day of April, 1951.

JOHNSTON MURRAY,
Governor of the State of Oklahoma.

Office of Secretary of State: Received by the Secretary of State this 10th day of April, 1951, at 8:45 o'clock A. M.

By JOHN D. CONNER.

Correctly Enrolled: William L. Jones, Chairman, Committee on Engrossed and Enrolled Bills.

The only part of the oath (Section 2 of said statute) asserted by appellants to render said statute unconstitutional as to each of them, is the second rhetorical paragraph thereof.

Incidentally, this second rhetorical paragraph is the very part omitted by the Supreme Court of the State of Oklahoma from its judgment and decision upholding the validity of said statute, including the validity of the oath (237 P. 2d 131, 135).

VI

The Nature of the Case, Rulings of the Oklahoma Supreme Court Bringing Case Within Jurisdictional Provisions, and the Manner and Way in Which Federal Questions Were Raised.

A. *The Nature of the Case*

This suit was instituted in the District Court of Oklahoma County, Oklahoma, hereinafter called District Court (R. 7), by defendant in error-appellee, Paul W. Updegraff, who filed his petition as a citizen and taxpayer of the State of Oklahoma, against the Board of Regents of Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, who were also plaintiffs in error in the Supreme Court, of the State of Oklahoma, to enjoin the payment to all teachers, professors and other employees who failed to take and subscribe to the oath required

by said statute within thirty days from April 9, 1951, the effective date of said statute. The said Board of Regents, State Treasurer and State Auditor, who were defendants in the District Court and represented by the Attorney General of the State of Oklahoma, filed an answer, admitting that defendant in error was a proper party to institute the suit, conceded the existence of valid contracts of employment of teachers, professors and other employees, including appellants, in effect during the fiscal year ending June 30, 1951. The appellants, by permission of the District Court (R. 26), filed separate petitions in intervention and, by permission of court (R. 28), filed a consolidated petition alleging that each appellant was serving Oklahoma Agricultural and Mechanical College under a valid contract of employment, extending at least during the fiscal year ending June 30, 1951; that the annual salaries of appellants were: Correll, $6,000.00; Lee, $4,200.00; Wieman, $3,600.00; Baum, $3,600.00; Nietz, $3,000.00; Schmoe, $1,610.00; Zieber, $900.00; that each appellant is ready, able and willing to perform, is now performing, and will continue to perform services under his contract; that each appellant is entitled to receive payment under his contract for said services. By way of cross-action to appellee's petition to enjoin payment to appellants, each appellant adopted the allegations set forth in said consolidated petition in intervention and prayed the judgment of the District Court that a mandatory injunction issue, compelling and requiring said Board of Regents, State Treasurer and State Auditor to do everything necessary to effect payment to each appellant for services performed under his contract of employment in the consolidated petition and cross-action. Each appellant alleged that a denial of the payments due him under said contracts as a result of the application of said statute would violate the constitutional rights of each appellant in several respects, including the respects specifically set forth and specifically adjudi-

cated by the Supreme Court of the State of Oklahoma in the respects hereinafter set forth.

The case was tried upon stipulations entered into in writing between all parties before the trial in the District Court, and entered into orally during the trial in the District Court. The following is the stipulation (R. 86) entered into in writing before the trial in the District Court and introduced as evidence:

> "It is hereby stipulated and agreed by and between the plaintiff, defendants and intervenors in the above cause that the plaintiff is a taxpayer and citizen of the State of Oklahoma; that the teachers and professors referred to in the pleadings herein were employed by the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges prior to April 9, 1951, to teach in the colleges referred to in the pleadings for and during the school year ending on or prior to June 30, 1951; that the other employees referred to in the pleadings were employed by the defendant, Board of Regents, prior to April 9, 1951, to perform services in the colleges referred to in the pleadings for prescribed periods exceeding thirty (30) days, but not necessarily for the entire school year 1950-51; that said employments were made by virtue of recommendations of employment by the Presidents of said colleges to the defendant, Board of Regents, which recommendations were approved or ratified by the Board after the beginning of the fiscal year ending June 30, 1951, after which said teachers, professors and employees entered into the duties of their respective employments, all of which is reflected in the official minutes of the board; that no written contracts of employment were executed by said teachers, professors and employees with said Board of Regents, except as the above procedure may constitute the execution of such contracts; that the procedure above outlined is in accord with the customary and traditional practice of said board in effecting the employment of teachers, professors and employees in said colleges; that funds are now lawfully available to pay the salaries

of said teachers, professors and employees during the fiscal year ending June 30, 1951; that said teachers, professors and employees, including intervenors, have in all things complied with their respective employments and have done all things required by law in the performance thereof as a condition precedent and as a condition subsequent to the right to receive compensation therefor, except that said have not taken the oath set forth in Section 2 of House Bill No. 8 of the Twenty-third Oklahoma Legislature; that said teachers, professors and employees, including intervenors, have heretofore received payment under their respective employments up to and including the month of April, 1951, and are now ready, willing and able to perform, are now performing and will continue to perform services under their respective employments; and that the intervenors, Baum, Correll, Hunt, Schmoe and Nietz hold religious convictions against bearing arms against their fellow men.

It is further stipulated that "Part II, Text of Policy Statement," attached hereto as a part of this stipulation, constitutes the present policy, in so far as it affects Oklahoma Agricultural and Mechanical College only, adopted by the defendant board April 6, 1945, by the procedure reflected upon the official minutes of said board, as follows:

"It was moved by Mr. Stuart, seconded by Mr. Harber that Dr. Bennett's recommendations for adoption of policy statement of the President's committee dated April 10, 1945, consisting of pages 5 to 11, inclusive, be approved, as submitted, with one exception, viz., that salaries of Deans are to be from $4,000.00 to $7,500.00 instead of $4,000.00 to $6,000.00. Approval be subject to all limitations of the budget.

"Motion carried."

It is also stipulated that A. S. J. Shaw is the duly elected, qualified and acting State Treasurer of Oklahoma; that Wilburn C. Cartwright is the duly elected, qualified and acting State Auditor of Oklahoma; that

the compensation of the teachers, professors and employees referred to in the pleadings is largely paid from state funds; that attached to this stipulation is a list of teachers, professors and employees, separately listed as to colleges, of the colleges referred to in the pleadings who had not on or before midnight May 9, 1951, taken and subscribed to the oath as set forth in Section 2 of said House Bill; that included in said list are teachers, professors and employees who are nationals or citizens of other countries and teachers, professors and employees who have religious scruples against bearing arms; and that any of the parties hereto reserve the right to introduce competent evidence at the trial of this cause with this stipulation.

Dated this 17th day of May, 1951.

PAUL W. UPDEGRAFF,
Attorney for Plaintiff.

By ROBERT J. EMERY,
EMERY & EMERY,
DON EMERY,
Attorneys for Intervenors.

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;
FRED HANSEN,
First Assistant Attorney General;
Attorneys for Defendants.

All parties also stipulated (R. 75) as follows:

"Mr. Emery: * * * May it be admitted by the Attorney General and counsel for the plaintiff, that each of the intervenors do not advocate and do not belong to any organizations that advocate the overthrow of the government of the United States or the State of Oklahoma by force and violence?

Mr. Updegraff: No, I won't say that. I will say that each of them, if here to testify, would so testify.

Mr. Emery: Then, that their testimony as to the facts alleged in their consolidated petition in interven-

tion may be considered as testimony in this case, as to all facts so alleged, without any challenge as to its competency?

Mr. Updegraff: That's right.

Mr. Hanson: That is satisfactory.

Mr. Emery: All right.

The Court: If I understand you gentlemen correctly, there is no contention that any of these parties are Communists?

Mr. Updegraff: No. We don't say that at all.

Mr. Emery: There is no contention as to that.

The Court: And, they have refused to sign this oath because they are unwilling to bear arms in defense of the United States.

Mr. Emery: That is one of the grounds, but there are several other grounds. The issues are much deeper than that.

Mr. Updegraff: I don't stipulate that none of these people are Communists. I stipulate only that if they were put on the witness stand they would so testify, and their testimony to that effect be considered as evidence in this case."

The consolidated petition was offered in evidence at the trial and was by the District Court admitted in evidence (R. 75). The consolidated petition introduced in evidence by agreement of all parties (R. 33, 34, 35, 39, 40, 41) stated, among other things, that:

"Each intervenor is a citizen and subject of the United States of America and of the State of Oklahoma, a resident of Payne County, Oklahoma, and is now serving Oklahoma Agricultural and Mechanical College as follows: Intervenor Wieman is Assistant Professor of Philosophy; Intervenor Ziebur is Research Assistant for Research Foundation; Intervenor Baum is Assistant Professor of Botany; Intervenor Lee is Associate Professor of Chemistry; Intervenor Correll is Professor of Physics and Chairman of Physical Science; Intervenor Schmoo is a Secretary, and Inter-

venor Nietz is Assistant Professor of Music, each under a valid contract of employment with the defendant Board of Regents and with the Oklahoma Agricultural and Mechanical College, for a term commencing at a time prior to the effective date of an Act enrolled as House Bill No. 8, and passed by the 23rd Oklahoma Legislature; that said contract extends, according to its term, at least to the end of the current fiscal year; * * * that funds are lawfully available to meet the salary obligations of each of said contracts; that each intervenor has in all things complied with said contract, and has done all things required by law in the performance thereof, and required by law as a condition precedent and as a condition subsequent to the right to receive compensation thereunder; that said contract does not require intervenor to take any oath of any kind or to do anything mandated by 'the oath' hereinafter referred to, or to refrain from doing anything proscribed by said Oath; that each intervenor has heretofore received payments monthly thereunder up to and including the month of April, 1951; that each intervenor is now ready, able and willing to perform, and is now performing, and will continue to perform services thereunder during the term thereof without interference from the defendant Board of Regents, or from any of its authorized agents; that this intervenor is entitled to have defendant Board of Regents direct its authorized agent, and to have the defendant, A. S. J. Shaw, as State Treasurer of the State of Oklahoma, and to the defendant, Wilburn C. Cartwright, as State Auditor of the State of Oklahoma, to do any and all things lawfully necessary to be done to effect payment thereunder to this intervenor; and to each intervenor;

That each intervenor is not a member of any organization, political or otherwise, that advocates, that he has not and will not advocate, the overthrow of the Government of the United States of America or of the State of Oklahoma, by force or violence, or unlawful means;

* * * * * * *

And intervenors further allege, and each intervenor alleges, in reference to his contract of employment, independently thereof and as a part and parcel thereof, that, by the uniform custom, policy and practice of the said defendants, Board of Regents of the Oklahoma Agricultural Colleges, and by the implied understanding and agreement between each intervenor and the said defendants it is contemplated that each intervenor will be retained in the service of said defendants and his employment will be renewed from time to time at the expiration of each term thereof so long as there is need of the services rendered by each intervenor at the said Oklahoma Agricultural and Mechanical College, and so long as each intervenor renders efficient and faithful service and demeans himself in a sober, honest and upright manner; that the said Act, and the requirements thereof, if interpreted and applied in accordance with plaintiff's allegations herein, constitutes an unconstitutional interference in respect to each claim of unconstitutionality hereinabove alleged, and constitute an unconstitutional interference with the right of defendant Board of Regents to continue said custom, policy and practice in the exercise of their constitutional authority to govern and manage the said College, and of each intervenor to have the said Board of Regents free to continue said custom, policy and practice and, in pursuance thereof, to continue each intervenor in his present position and employment without regard to considerations other than the proper and efficient functioning of said College as an educational institution and for the accomplishment of the functions for which it was created; that each intervenor is entitled to have the said defendant Board of Regents free to continue said custom, policy and practice and, in the exercise of their legal and constitutional discretion, free to continue and to renew his said employment, without hindrance or control by the said unconstitutional provisions of said statute and without interference by the refusal of said other defendants,

A. S. J. Shaw and Wilburn Cartwright, to perform their official duties in respect to the employment of each intervenor so long as said employment shall be continued by said defendant Board of Regents.

That intervenor has not taken the Oath; that each intervenor, except Ziebur and Wieman, conscientiously and sincerely believes that war and the use of force between nations is contrary to the Will of God, and is forbidden by divine law, and that in obedience to these principles, and as a matter of religious faith and obligation, each intervenor, except Ziebur and Wieman, cannot and will not, because of his aforesaid religious convictions, bear arms against his fellowman; * * *."

The District Court in its judgment made the following findings of fact (R. 237): "The court finds the facts in this case to be as set forth in the stipulations entered into by and between the parties, and that the parties have agreed that the case comes on for hearing on the permanent injunction."

All appellants, except Ziebur, took and subscribed to all parts of the oath as set forth in haec verba in the decision and opinion of the Supreme Court of the State of Oklahoma (R. 199-204). The judgment of the District Court was (R. 245):

"It Is Therefore Ordered, Adjudged and Decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and the intervenors."

This judgment is set forth in the third rhetorical paragraph of the opinion of the Supreme Court of Oklahoma, 237 P. 2d 131, 134.

B. Rulings of the Oklahoma Supreme Court Bringing Case Within Jurisdictional Provisions

In deciding what issues were before it, the Supreme Court of the State of Oklahoma in its decision and opinion said: "Only those propositions asserted which are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors will be discussed." (237 P. 2d 131, 135.)

The Supreme Court of the State of Oklahoma entertained and considered specifically the contention of each appellant that the statute impairs the obligation of contract, contrary to Article I, Section 10 of the Constitution of the United States. The court said in part (237 P. 2d 131, 137):

> "The Act does not impair obligation of contract contrary to Article II, Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States.
>
> " 'All parties dealing with a sovereign power, or one of its functionaries, in the exercise of governmental power, the subject of which pertains to government (schools in this case), do so knowing it cannot contract * * * the power conferred for self-protection or self-preservation. The rule, therefore, that the Legislature can pass no law impairing the obligation of contracts does not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public. * * *' "

In passing upon the contention of each appellant that said statute took liberty and property without due process of law, the Supreme Court of the State of Oklahoma said in part (237 P. 2d 131, 137):

> "The statute and the required loyalty oath do not deprive public officials and employees of property or

liberty without due process of law. The intervenors are employees of the state as teachers in a public institution. They have no constitutional right to be so employed. They have no right to so serve the state except upon such terms as the state prescribes. The act does not purport to take away their right to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them. People v. Crane, 214 N. Y. 154, 108 N. E. 427, L. R. A. 1916D, 550; Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206, 207; Ellis v. U. S., 206 U. S. 246, 27 S. Ct. 600, 51 L. Ed. 1047; McAuliffe v. Mayor, etc., City of New Bedford, 155 Mass. 216, 29 N. E. 517."

In passing upon the contention of each of the appellants that entertain religious convictions against bearing arms, and that as to them said statute violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, the Supreme Court of the State of Oklahoma said (237 P. 2d 131, 138):

"It is alleged by some conscientious objectors that the required loyalty oath invades their freedom of religion guaranteed by both the State and Federal Constitutions. The part of the oath which it is alleged so invades this guaranty is 'that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary' (that is, if by valid law required). The provisions of the Constitution against the enactment of any law prohibiting the free exercise of religion 'embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.' Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 903, 84 L. Ed. 1213. * * * The required oath does not invade one's constitutional right to the free exercise of religion guaranteed by Article I, Section 2 of the Oklahoma Constitution and the First Amendment of the Federal Constitution. For

interesting reading on the subject see Wooley v. Watkins, 2 Idaho, Hasb., 590, 22 P. 102."

In passing upon whether or not said statute constituted a bill of attainder in violation of Article I, Section 10 of the Constitution of the United States, the Supreme Court of the State of Oklahoma said (237 P. 2d 131, 138):

> "An ex post facto law is one which provides a punishment for an act which was innocent when committed. Punishment is a necessary incident to either a bill of attainder or an ex post facto law. Punishment such as contemplated by the inhibiting clauses of the State and Federal Constitutions is not present here. The act is neither a bill of attainder nor an ex post facto law."

Finally, the Supreme Court of the State of Oklahoma, in summation, said (237 P. 2d 131, 138, 139):

> "The Legislature had the power and duty to prescribe qualifications for teachers in our public institutions. The loyalty oath required as a prerequisite to payment for teaching in our public institutions cannot be said as a matter of law to be unreasonable, arbitrary, and capricious or to violate any constitutional rights guaranteed by either the State or Federal Constitutions. All parts of the loyalty oath required appear to be reasonably related to the purposes of the Act."

C. The Manner and Way in Which Federal Questions Were Raised.

The Federal questions arising under the Constitution of the United States that were actually considered, and decided by the Supreme Court of the State of Oklahoma in upholding the validity of said statute, were raised by appellants in:

(a) Their consolidated petition in intervention (R. 33, 35, 36, 37, 38) and their consolidated cross-action filed in the District Court (R. 43).

(b) Their motion for a new trial (R. 216-224, incl.).

(c) Their petition in error, including assignments of error filed in the Supreme Court of the State of Oklahoma.

(d) Their briefs submitted in the Supreme Court of the State of Oklahoma.

(e) Their petitions for re-hearing filed in the Supreme Court of the State of Oklahoma.

The contention that said statute constituted a bill of Attainder, in violation of Article I, Section 10 of the Constitution of the United States, was raised by appellants only under (c), (d) and (e) above. This issue was submitted also in the briefs of all the parties to the case.

Moreover:

> "Where it appears from the opinion of the State court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the Court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court." (*Charleston-Federal Savings & Loan Ass'n* v. *Alderson*, 324 U. S. 182, 185-6.) See also *State* v. *Brand*, 303 U. S. 95.

VII

Grounds Upon Which It Is Contended the Federal Questions Involved Are Substantial.

In stating the grounds upon which it is asserted that the federal questions involved are substantial, reference is first made to the specific holdings, set forth above under VI B, by the Supreme Court of the State of Oklahoma in sustaining the validity of said statute under the Constitution of the United States. Reference is also made

to Section 2 as set forth in full under V above. The middle paragraph thereof, as interpreted by the Supreme Court of the State of Oklahoma (237 P. 2d 131, 135, 136), required each appellant to swear that within the last five years he had not been a member of any organization officially determined to be communistic or subversive by the Attorney General of the United States or other authorized agency. Each appellant holding sincere religious convictions, opposed to the bearing of arms against his fellowman, was required to swear that he would take up arms in defense of the United States in time of war or national emergency, if necessary. If this oath were not taken and subscribed to within thirty days after the effective date of the statute, Section 1 thereof provided that he shall forfeit his employment, and Section 5 provided that he should receive no compensation for such failure. Each appellant asserts that the infliction of such punishment for the failure to take such an oath constitutes a violation of his rights under the Constitution of the United States in the following respects:

The refusal of the District Court to grant each intervenor mandatory injunctive relief, requiring payment for services rendered up to the day of Judgment in the District Court, under a valid and subsisting contract in effect prior to the enactment of said statute, and the affirmance of said judgment by the Supreme Court of the State of Oklahoma, resulting in the application of said statute to each intervenor:

(a) Impairs the obligation of contracts, contrary to article I, Section 10 of the Constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts. (*James Hall v. State of Wisconsin*, 102 U. S. 5 (see also Butler vs. Regents of University, 32 Wis. 124, cited in *James Hall v. State of*

Wisconsin); State v. Brand, 303 U. S. 95; *State of Mississippi for use of Robertson* v. *Miller*, et al., 276 U. S. 174; *Triegle* v. *Acme Home-Stead Association*, 297 U. S. 189.)

(b) Constitutes said statute as a bill of attainder, in violation of Article I, Section 10 of the Constitution of the United States, providing that no state shall pass a bill of attainder. (*United States* v. *Lovett*, 328 U. S. 303; *Garner, et al.* v. *Board of Public Works of the City of Los Angeles*, 341 U. S. 716.)

(c) Is a deprivation of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by virtue of the denial of compensation due under a valid and subsisting contract. (*Connally* v. *General Construction Co.*, 269 U. S. 385, and cases cited under (a) above.)

(d) Is a deprivation of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, by requiring each appellant to swear that he will take up arms in defense of the United States in time of war or national emergency, if necessary, when each appellant holds sincere convictions in conflict thereto. (*West Virginia State Board of Education, et al.* v. *Barnette, et al.*, 319 U. S. 624.)

(e) Constitutes an unconstitutional interference with the exercise by the Congress under Article I, Section 8 of the Constitution of the United States, delegating to the Congress the power to raise and support armies and provide and maintain a navy, the Congress by the enactment of the Selective Service Act of 1948 having adopted a complete, comprehensive and fully integrated scheme in the exercise of such powers. (Hines, Secretary of Labor and Industry of Pennsylvania, et al., 312 U. S. 52.)

(f) The Supreme Court of the State of Oklahoma, in the exercise of its judicial powers of interpretation (237

P. 2d 131, 135), gave the oath required by said statute a meaning not anticipated by men of common intelligence, and denied the request of each appellant, asserted in his petition for a re-hearing, to take and subscribe to the oath as interpreted by the Supreme Court of the State of Oklahoma. (*Connally* v. *General Construction Co.*, 269 U. S. 385; *Garner, et al.* v. *Board of Public Works of the City of Los Angeles*, 341 U. S. 716.) (Petition for Rehearing II, 7.)

The interpretations referred to immediately above, as given by the Supreme Court of the State of Oklahoma in its said judgment and decision, are:

(a) By construing that "I am not affiliated directly or indirectly with . . . any foreign political agency, party, organization or government" as meaning any foreign political agency, party, organization or government officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization.

(b) By construing the language of the oath, "that I am not affiliated directly or indirectly with" to mean "that I am not affiliated directly or indirectly with at the time of the passage of the Act."

(c) By construing the language of the oath, "That within five (5) years immediately preceding the taking of the oath I have not been a member," to mean within the five years immediately preceding the passage of the Act, without regard to when the Oath is taken.

(d) The language of the oath, "that I will take up arms in defense of the United States in time of war or national emergency, if necessary," means in respect of the words "if necessary", if by valid law required.

VIII

Cases Sustaining Jurisdiction of the United States Supreme Court.

(A) The appeal, having been perfected within ninety days from the date on which the judgment of the Supreme Court of the State of Oklahoma became final, is timely (Section 2101, Title 28, United States Code, Revised).

(B) Appeal is the proper remedy for review of a decision of a state court of last resort in favor of the validity of a state statute, where such statute is alleged to contravene the Constitution of the United States (Section 1257, Title 28, United States Code, Revised). *Breard* v. *City of Alexandria, La.*, 341 U. S. 622; *Hamilton* v. *Regents of University of Calif.*, 293 U. S. 345; *Winters* v. *People of State of New York*, 333 U. S. 507.

IX

Judgment and Opinion Appended Hereto

Copy of the judgment and decision of the Supreme Court of the State of Oklahoma, filed October 18, 1951, is appended hereto. Additionally, the Order Sheet of the Supreme Court of the State of Oklahoma, dated November 6, 1951, contains the following statement:

"The Clerk is hereby directed to enter the following orders:

25160—Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, Luella Nietz, et al., Plaintiffs; Paul W. Updegraff, Board of Regents of Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer, and Wilburn C. Cartwright, State Auditor, of Oklahoma; Defendants. Petition for re-hearing and oral argument denied."

WHEREFORE, it is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under Section 1257, Title 28, United States Code, Revised.

Dated: January 18th, 1952.

H. D. (DON) EMERY,
ROBERT J. EMERY,

Attorneys for Appellants, Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Hunt Lee, Jr., Malcolm Correll, Lillian A. Schmoe, and Lillian Nietz.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Filed in Supreme Court of Oklahoma, Oct. 18, 1951
Andy Payne, Clerk.

No. 35,160

The Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, *Plaintiffs in Error,*

also

Robert M. Wieman, Nancy Kent Ziebur, Werner C. Baum, Samuel Lee Hunt, Jr., Malcolm Correll, Lillian A. Schmoe, Luella Nietz and Aboulhassan Zirakzadek, *Intervenors, Plaintiffs in Error*

v.

Paul W. Updegraf, *Defendant in Error*

Syllabus

1. The authority of the Legislature extends to all rightful subjects of legislation. It is not only the duty of the Legislature but it has the power to protect the general welfare of the People of the State by the exercise of the police power against subversive influences. 51 O. S. 1941 (Supp.), 37.1 to 37.8 constitutes an exercise of the police power by the Legislature. Such acts are valid so long as they are not unreasonable, arbitrary, and capricious and do not violate any of the fundamental constitutional guaranties of the State and Federal Constitutions.

2. Loyalty of public officials and employees of the State is essential to the preservation of the peace and welfare of the people and may be prescribed as a qualification to hold public office or public employment by the State.

3. A loyalty oath required by an act of the Legislature fixing loyalty as a qualification for public officials and employees of the State may be required as a necessary precedent to the right to continue in the service of the state and draw compensation therefor so long as the terms thereof are reasonably referable and cognate to the purposes of the act and do not violate constitutional guaranties.

4. The foregoing act is not a bill of attainder or ex post facto law; nor does the oath required therein violate Article I, Section 10, Constitution of the United States or Article II, Section 15, Constitution of Oklahoma (inhibition against impairment of contract); the Fourteenth Amendment to the Constitution of the United States or Article II, Section 7 of the Constitution of Oklahoma (due process clause); the First Amendment to the Constitution of the United States or Article I, Section 2 of the Constitution of Oklahoma (free exercise of religion).

Appeal from the District Court of Oklahoma County.
The Honorable W. A. CARLILE,
Judge.

Affirmed

Action to enjoin payment of salaries of teachers, professors, and other employees of the Oklahoma Agricultural colleges, and cross-action for mandamus or mandatory injunction to require such payment.

Mac Q. Williamson, Attorney General; Fred Hansen, First Assistant Attorney General of Oklahoma City, Okla., for Plaintiffs in Error.

Don Emery, Robert J. Emery, Emery & Emery, of Oklahoma City, Oklahoma, for Intervenors, Plaintiffs in Error.

Paul W. Updegraff, of Norman, Oklahoma, for Defendant in Error.

John G. Hervey, Ralph J. May, Hervey & May, of Oklahoma City, Oklahoma, Amicus Curiae.

* * * * * * *

ARNOLD, *C. J.:*

This action was begun in the District Court on May 9, 1951, by a taxpaying citizen to enjoin the Board of Regents

of the Agricultural Colleges, the State Treasurer, and the State Auditor from paying public funds to teachers in the Agricultural and Mechanical College at Stillwater who had not subscribed to and filed the loyalty oath prescribed by Enrolled House Bill No. 8, 23rd Legislature (Laws 1951; 51 O. S. 1941 (Supp.), 37.1-37.8). A temporary restraining order was issued.

Before the date fixed for the hearing on the application for temporary injunction, certain teachers in the College who had contracts with the Board of Regents to teach at least to the end of the school term, June 30, 1951, with leave of court their consolidated petition in intervention and cross-petitions praying for injunctive relief requiring the payment of their accrued monthly salaries.

When the cause came on for trial evidence by stipulation was introduced and entertained. The trial court made conclusions of law and entered the following judgment:

> "It Is Therefore Ordered, Adjudged and Decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and the intervenors. Exceptions allowed to all parties."

The cross petitioners, none of whom had filed the oath required by the Act at the time of trial and entry of judgment in the latter part of May, 1951, and the Board of Regents make many contentions. It is not necessary nor expedient to set forth the various and varying contentions made by appellants. Only those propositions asserted with are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors will be discussed.

Pertinent to the issues raised here the act provides:

> "Every officer and every employee of the State, county, school district, municipality, public agency, public authority, or public district shall within the first thirty (30) days after taking office, or within the first

thirty (30) days of such employment, take and subscribe to the oath or affirmation required by this Act. * * * Any officer or employee of the State, County, school district, municipality, public agency, public authority, or public district who fails to take and subscribe the oath or affirmation required by this Act within the time specified in this Section, shall forfeit his or her office or employment.

"The oath or affirmation required by this Act shall be the following:

"I —— —— do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that during such time as I am .....

.....

(Here put name of office, or, if employee, insert 'An employee of' followed by the complete designation of the employing officer, office, agency, authority, commission, department, or institution.)

I will not advocate and that I will not become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means."

The Act further provides:

> "No compensation nor reimbursement for expenses incurred shall be paid to any public officer or employee by any public agency unless such officer or employee has taken and subscribed to the oath or affirmation required by this Act."

The Act provided for severability as to the various provisions thereof and severability as to parts of the oath.

Before going further into a specific discussion of alleged invalidity for certain stated reasons the apparent confusion as to the interpretation to be given the parts of the oath required should be dispelled. The phrase of the oath which refers to affiliation "with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization" refers to a list or lists of such organizations in existence at the time of the passage of the act which had been prepared by the Attorney General under Governmental directive. Such list or lists are in effect made a part of the oath by reference. It must be assumed they are readily obtainable. Nothing appears to the contrary. There was no attempt on the part of the Legislature to confer authority, judicial or otherwise, upon the Attorney General in the preparation of said list or lists. It also must be assumed that the Legislature determined for itself that all those groups so listed by the Attorney General, whether foreign or domestic, were subversive organizations or communist fronts. To illustrate: One taking the oath swears that he is not affiliated "with any foreign political agency" listed by the Attorney General as being a communist front or subversive organization. This part of the oath does not contemplate non-membership in any organization, foreign or domestic, which does not appear on the list or lists of the Attorney General in existence at the time of the passage of the Act. There is no requirement in the act that an oath be taken of non-membership in

organizations not on the list of the Attorney General of the United States at the time of the passage of this act.

That part of the oath "that I will take up arms in defense of the United States in time of War or National Emergency, if necessary" means that the affiant will take up arms in time of War or National Emergency if by law required.

The part of the oath that says "that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, * * * refers to the same organizations listed by the Attorney General and in existence at the time of the passage of the Act. It has no reference to organizations that may have been added by the Attorney General after the passage of the act and up to the time of the taking of the oath. The oath under this phrase is to the effect that affiant has not been a member of any of the organizations so listed by the Attorney General within the five-year period previous to the taking of the oath.

The statement in the oath: "That I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic" means that the affiant, be he citizen or resident alien, will support and defend the laws of this land and the form of government which is thereby established against all enemies, that is, subversive elements, whether foreign or domestic.

That part of the oath "That I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma" is objected to only by a friendly alien. He asserts sincere fear that the oath in the respects hereinafter mentioned would in effect require him to forswear allegiance to his native country.

> "Allegiance is of three kinds: (1) *natural or implied*, when it arises by operation of law, as in the case of natural-born subjects; (2) *acquired*, when it is owed by a person as a result of his receiving the rights of citizenship, as by naturalization or denization; (3) *local*, when it arises merely from the fact of residing in and receiving the protection of a country, as in the case of a resident alien."
>
> ——Webster's International Dictionary.

Obviously, a resident alien taking the oath would be pledging allegiance of the local type; there is nothing in the oath which requires him to forswear his allegiance to his native country or the country of which he may be a citizen, nor is there anything in the oath which would conflict with any allegiance owed by him to the country of which he is a national. Any resident alien is bound to obey our laws as a condition of his residing here and receiving the protection of our laws, which he is entitled to if lawfully in the United States. If an employee of the State, it is just as necessary that he be loyal to our government, its laws and institutions while here and enjoying the full protection of our laws and sharing the benefits that our institutions and form of government afford as it is that our citizens under like circumstances be loyal. He is also under the misapprehension that the requirement of the oath that "I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary" constitutes an assertion or oath by him that he would take up arms against the government of which he is a citizen. This part of the oath does not include or refer to a resident alien's country of which he is a citizen. This conclusion is inescapable in recognition of the reasonableness and fairness of the Legislature. This interpretation will no doubt dispel any fears in the mind of such friendly alien. The Legislature did not intend to require as a condition precedent to employment by the State that one take an oath that in case of war he would bear arms against his native land.

The real design and purpose of the Legislature in the enactment of House Bill No. 8 is not difficult to ascertain. The real purpose of the Legislature was to make loyalty a qualification to hold public office or be employed by the State. Incidentally and in order to effectuate its real purpose the Legislature also intended by the Act to force officers or employees of the State who are to have been within a fixed time members of the Communist Party or other subversive organizations out of governmental positions. It is now commonly known that the Communist Party and its members advocate the overthrow of government by force and violence. Such teaching and advocacy is contrary to

our Democratic form of government and detrimental to the welfare of the people. The same thing may be said of any other subversive organization. Inasmuch as the authority of the Legislature extends to all rightful subjects of legislation it is not only the duty of the Legislature but it has the power to protect the general welfare of the people of the State by the exercise of the police power against subversive influences. The act in question constitutes an exercise of the police power by the Legislature. Such acts are valid so long as they are not unreasonable, arbitrary, and capricious and do not violate any of the fundamental constitutional guaranties of the State and Federal Constitutions. We recently said in the case of Palmer Oil Corp. v. Phillips Petroleum Co., et al., — Okla. —, 231 P. 2d 997:

> "The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be arbitrary, capricious, and unreasonable, and hence, irreconcilable with the conception of due process of law. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are ordinarily matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

The Act does not impair obligation of contract contrary to Article II Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States.

> "All parties dealing with a sovereign power, or one of its functionaries, in the exercise of governmental power, the subject of which pertains to government (schools in this case), do so knowing it cannot contract the power conferred for self-protection or self-preservation. The rule, therefore, that the Legislature can pass no law impairing the obligation of contracts does

not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject matter of the contract is one which affects the safety and welfare of the public. In such cases, "the presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public withdraw such subjects from the police power of the Legislature'. Chicago, B. & O. R. *v.* Nebraska, 170 U. S. 72, 42 L. Ed. 948, 18 Sup. Ct. 513."

Board of Education of the City of Leavenworth v. *Phillips*, 67 Kan. 549, 73 P. 97.

To hold otherwise would be to subject the exercise of the police power inherently vested in a sovereign people to the will of contracting individuals. See *Boston Beer Co.* v. *Mass.*, 97 U. S. 33, 24 L. Ed. 989.

The statute and the required loyalty oath do not deprive public officials and employees of property or liberty without due process of law. The intervenors are employees of the state as teachers in a public institution. They have no right to so serve the state except upon such terms as the state prescribes. The act does not purport to take away their right to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them. *People* v. *Crane*, 214 N.Y. 154, 108 N. E. 427, L. R. A. 1916D 550; *Heim* v. *McCall*, 239 U. S. 175, 60 L. Ed. 207, 36 Sup. Ct. 78; *Ellis* v. *U. S.*, 206 U. S. 246, 51 L. Ed. 1047, 27 Sup. Ct. 600; *McAuliffe* v. *Mayor, etc. City of New Bedford*, 155 Mass. 216, 29 N. E. 517.

Like the success of a business, the preservation of peace, the public welfare and the integrity of law and order, in fact, our form of government, are dependent upon loyalty of public officials and employees of government. This is well known and fully recognized by all well intentioned people. Public officials assume office and employees of the state enter upon their duties with full knowledge, and in these times expectation, that the state will, if it has not already done so, make full investigation on the point and if

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thought expedient require an oath disclosing the attitude of public officials and employees. Loyalty should be and by House Bill No. 8, 23rd Legislature, is a prescribed qualification of public officials and employees of the State. Intervenors are such employees.

It is alleged by some conscientious objectors that the required loyalty oath invades their freedom of religion guaranteed by both the State and Federal Constitutions. The part of the oath which it is alleged so invades this guaranty is "that I will take up arms in defense of the United States in time of War, or National Emergency, if necessary" (that is, if by valid law required.) The provisions of the Constitution against the enactment of any law prohibiting the free exercise of religion "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell et al.* v. *State of Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213. Though some sort of exemption has always been provided for conscientious objectors in the matter of bearing arms in time of war, such persons could be legally required to bear arms. Under such a legal requirement a citizen of the United States, though a conscientious objector, would be disloyal if he absolutely refused to obey such law. Loyalty in upholding the Constitutions and laws, State and Federal, may be made a qualifying prerequisite to employment by the State. Religious practice, though in conformity with religious belief, may be interfered with where such practices are in violation of law. A conscientious objector taking the oath required can still entertain such religious beliefs as his conscience dictates and act freely in the exercise thereof so long as he does not violate or refuse to obey laws. The required oath does not invade one's constitutional right to the free exercise of religion guaranteed by Article I Section 2 of the Oklahoma Constitution and the First Amendment of the Federal Constitution. For interesting reading on the subject see *Wooley* v. *Watkins*, 2 Idaho 590, 22 Pac. 102.

Is this act a bill of attainder or ex post facto law? A bill of attainder is a legislative act which inflicts punish-

ment without judicial trial. It is contended that the act is a bill of attainder because it punishes one for refusal to take an oath that he has not been a member of listed organizations by vacating his position and denying him compensation. We think the Supreme Court of the United States has answered the question in *Garner* v. *City of Los Angeles*, 98 A. C. A. 694, 71 Sup. Ct. 909, decided June 4, 1951. In that case civil service employees of the City of Los Angeles were discharged because they would not subscribe to an oath similar to that provided by the Oklahoma Act. In upholding the ordinance requiring the taking of such an oath and holding that the ordinance was not a bill of attainder the United States Supreme Court said:

> "We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

An ex post facto law is one which provides a punishment for an act which was innocent when committed. Punishment is a necessary incident to either a bill of attainder or an ex post facto law. Punishment such as contemplated by the inhibiting clauses of the State and Federal Constitutions is not present here. The act is neither a bill of attainder nor an ex post facto law.

The Legislature had the power and authority to prescribe qualifications for teachers in our public institutions, and the duty to do so, and if it deemed necessary require a loyalty oath as a qualifying and necessary precedent to compensation for services rendered by employees of the state.

The Legislature had the power and duty to prescribe qualifications for teachers in our public institutions. The loyalty oath required as a prerequisite to payment for teaching in our public institutions cannot be said as a matter of law to be unreasonable, arbitrary, and capricious or to violate any constitutional rights guaranteed by either the State or Federal Constitutions. All parts of the loyalty oath required appear to be reasonably related to the purposes of the Act.

The judgment denying injunctive relief to intervenors on their cross petitions is affirmed.

Halley, V.C. J., Welch, Corn, Gibson, Johnson, O'Neal, and Bingaman, JJ: concur.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 35,160

THE BOARD OF REGENTS, et al., *Plaintiffs in Error,*

vs.

PAUL W. UPDEGRAF, *Defendant in Error.*

Order

It is hereby ordered that the name of defendant in error in the caption of the above styled cause be corrected to read "Paul W. Updegraff,"

Done by order of Court this 24th day of October, 1951.

BEN ARNOLD,
Chief Justice.

Filed in Supreme Court of Oklahoma, Oct. 24, 1951, Andy Payne, Clerk.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,160

THE BOARD OF REGENTS, et al., *Plaintiffs in Error*

vs.

PAUL W. UPDEGRAFF, *Defendant in Error.*

Order

It is hereby ordered that the vote shown on the opinion filed on October 8, 1951, be deleted.

Done by order of Court this 15th day of November, 1951.

BEN ARNOLD,
Chief Justice.

Filed in Supreme Court of Oklahoma, Nov. 16, 1951, Andy Payne, Clerk.

Statement of Paul W. Updegraff Opposing Jurisdiction and Motion to Affirm

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 590

ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, ET AL.,

Appellants,

vs.

PAUL W. UPDEGRAFF, THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OF PAUL W. UPDEGRAFF OPPOSING JURISDICTION AND MOTION TO AFFIRM

PAUL W. UPDEGRAFF,
Counsel for Appellee.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 35,160

THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA,

Plaintiffs in Error,

also

ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, SAMUEL HUNT LEE, JR., MALCOLM CORRELL, LILLIAN A. SCHMOE, LUELLA NIETZ AND ABOULGHASSEM ZIRAKZADEH,

Intervenors,

vs.

PAUL W. UPDEGRAFF,

Defendant in Error

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO AFFIRM.

The appellee in the above entitled cause, Paul W. Updegraff, for his statement as to the jurisdiction herein, and in support of appellee's motion to affirm, respectfully shows the following:

I

Statement of Issues on Appeal

The question sought to be presented in this appeal is appellants' claim that Enrolled House Bill No. 8, 23rd Legislature (Laws 1951; 51 O. S. A. 1941 (Supp.), 37.1—37.8),

violates the constitutional rights of each of the appellants, and impairs the obligation of the said contract and franchise in violation of Article I, Section 10 of the Fourteenth Amendment to the Constitution of the United States. These claims the appellee denies; and the State Supreme Court, in the opinion and judgment here challenged, determined the question so raised by appellants adversely to them.

The Court found that:

> "A loyalty oath required by an act of the Legislature fixing loyalty as a qualification for public officials and employees of the state may be required as a necessary precedent to the right to continue in the service of the state and draw compensation therefor so long as the terms thereof are reasonably referable and cognate to the purposes of the act and do not violate constitutional guaranties."

And the Court further held:

> "The foregoing act is not a bill of attainder of ex post facto law; nor does the oath required therein violate Article I, Section 10, Constitution of the United States or Article II, Section 15, Constitution of Oklahoma (inhibition against impairment of contract); the Fourteenth Amendment to the Constitution of the United States or Article II, Section 7 of the Constitution of Oklahoma (due process clause); the First Amendment to the Constitution of the United States or Article I, Section 2 of the Constitution of Oklahoma (free exercise of religion)."

The Court further said;

> "The Act does not impair obligation of contract contrary to Article II, Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States.
>
> " 'All parties dealing with a sovereign power, or one of its functionaries, in the exercise of governmental power, the subject of which pertains to government

(schools in this case), do so knowing it cannot contract * * * the power conferred for self-protection or self-preservation. The rule, therefore, that the Legislature can pass no law impairing the obligation of contracts does not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public. In such cases "the presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature." Chicago, B. & O. R. *v.* (City of Omaha) Nebraska, 170 U. S. (57) 72, 18 S. Ct. 513, 42 L. Ed. 948.' Board of Education of the City of Leavenworth *v.* Phillips, 67 Kan. 549, 73 P. 97, 98.

"To hold otherwise would be to subject the exercise of the police power inherently vested in a sovereign people to the will of contracting individuals. See Boston Beer Co. *v.* Mass., 97 U. S. 25, 33, 24 L. Ed. 989."

The Court further says:

"The real design and purpose of the Legislature in the enactment of House Bill No. 8 is not difficult to ascertain. The real purpose of the Legislature was to make loyalty a qualification to hold public office or be employed by the State. * * *" (Italics supplied).

The non-Communist Statement here involved is a condi-on of employment; there is no issue as to freedom of re-gion, thought, or speech.

The case of *Garner* v. *The Board of Public Works of the ity of Los Angeles,* 341 U. S. 716, decided June 4, 1951, is ne very similar to the instant case. There the City of Los ngeles provided by ordinance, in part, as follows:

"* * * no person shall hold or retain or be eligible for any public office or employment in the service of the

City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught; or who may, after this section becomes effective (April 28, 1941) advise, advocate or teach, or who is now or has been within five (5) years prior to the effective date of this section, or who may after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years, advised, advocated or taught the overthrow by force or violence of the government of the United States of America or of the State of California.

"In so far as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof." Cal. Stat. 1941, c. 67 p. 3409, Section 432.

At page 720 of the Garner case the Court said:

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

Again, at page 722, the Court said:

"* * * We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

Appellants assert that the words *"that I will take up arms in the defense of the United States in Time of War,*

or National Emergency, if necessary" is a deprivation of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. What did the Legislature have in mind when these words were written? Can the words mean other than bear arms if and when called upon to do so by the President as Commander-in-Chief, or agency of the Government vested with the power to call upon them to go into military service? This power is vested in the President by Congress by virtue of Title 50 U. S. C. A. 310.

Now let us apply this section of the oath to a native-born citizen with religious beliefs against war. What do the words in their application to this mean?

For example: An associate chemistry professor, genius, age 22, belongs to a religious faith opposed to war. War is declared against Russia and he is drafted. When he fills out his draft questionnaire he tells of his faith and, when drafted, is then assigned by the military authorities to non-combatant duty, or where the military authorities wish to place him.

Under those circumstances, could the chemistry professor sign that part of the oath as written: "*That I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary.*"?

Certainly, because in the final analysis Congress determines the ages and the classes called into military service and "*if it is necessary for a person to bear arms.*"

All branches of our armed forces provide special duties for persons holding religious scruples against bearing arms. As a matter of fact *any* person signing the oath "*to bear arms; if necessary*" is not affirming to do anything he will not have to do in any case if war comes. No rights are lost nor none gained insofar as bearing arms is concerned. 50 U. S. C. A. 310.

Before the Court is the question whether the State may

determine the fitness and suitability of employees for public service.

This law is to be applied only to future employment. The Legislature determined that any person belonging to the Communist party in the last five years could not be a future employee of the State. The effective date of the Act for employees already in the employ of the State was thirty days after the effective date of the Act, or May 9. On that date any person then in the State's employ and not taking the oath could not be employed by the State *in the future*. All salaries due State employees on May 9 for services rendered to that date were paid to the intervenors. The intervenors all failed or refused to execute and file the oath required by law and were discharged. It is true that any person who is a member of the Communist party or other organization declared by the Attorney General or other authorized agency of the United States to be a communist front or subversive organization could not subscribe to the oath required under penalty of perjury. Thus, failing to subscribe to the oath, they were no longer privileged to work for the State. The Legislature determined such persons were not trustworthy for *future employment*. The affidavit requirement is valid.

We further submit that the question presented in this appeal has been so definitely determined that no substantial question is presented by this appeal entitling the appellants to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore appellee respectfully moves that the judgment and decree of the Supreme Court of the State of Oklahoma be affirmed.

PAUL W. UPDEGRAFF,
Attorney for Appellee, Paul W. Updegraff.

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In The
Supreme Court of the United States

OCTOBER TERM, 1952

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SUPREME COURT, U.S.

No. 14

ROBERT M. WIEMAN; NANCY KENT ZIEBUR; WERNER C. BAUM; SAMUEL HUNT LEE, JR.; MALCOLM CORRELL; LILLIAN A. SCHMOE, and LUELLA NIETZ,

Appellants,

VERSUS

PAUL W. UPDEGRAFF; THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, State Treasurer of the State of Oklahoma, and WILBURN C. CARTWRIGHT, State Auditor of the State of Oklahoma,

Appellees.

Appeal from the Supreme Court of the State of Oklahoma

BRIEF OF APPELLANTS

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Oklahoma City, Oklahoma,
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AUGUST, 1952.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE 8-2969

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In The
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No. 14

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BRIEF OF APPELLANTS

OPINION BELOW

The decision and opinion of the Supreme Court of Oklahoma is reported in ____ Okl. ____, 237 P. 2d 131.

As indicated, the decision and opinion has not yet been reported in the official Oklahoma Reports. The opinion appears in the Transcript of Record, Pages 59 to 69.

JURISDICTION

The judgment and decision of the Supreme Court of Oklahoma herein appealed from was entered October 18, 1951 (R. 59). Appellants' Petition for Rehearing was timely filed in the Supreme Court of the State of Oklahoma on October 31, 1951 (R. 70), and was denied by said court on November 6, 1951 (R. 100). Petition for Appeal to this Court (R. 96) was presented to the Chief Justice of the Supreme Court of Oklahoma and allowed January 18, 1952 (R. 100), within 90 days after said judgment and decision became final. The jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

The Supreme Court of Oklahoma is the highest court of the State of Oklahoma. The judgment and decision appealed from is in favor of the validity of a statute of the State, which was and is drawn in question on the ground of its being repugnant to the Constitution of the United States, in the following particulars:

(a) Article 1, Section 10, prohibiting a State from impairing the obligation of contracts and prohibiting a State from passing a bill of attainder;

(b) The Fourteenth Amendment, providing that no State shall deprive any person of life, liberty or property without due process of law;

(c) Article 1, Section 8, delegating to the Congress the power to raise and support armies and provide and maintain a navy.

STATUTE INVOLVED

The statute of the State of Oklahoma, the validity of which is involved is "Enrolled House Bill No. 8, 23rd Legislature [Laws 1951; 50 O.S. 1941 (Supp.), Secs. 37.1-37.8]," and reads as follows:

"AN ACT

"ENROLLED HOUSE BILL NO. 8—By: SHIRLEY.

"An Act relating to public officers and public employees; prescribing an oath or affirmation to be taken by every officer and employee of the State, county, school district, municipality, public agency, public authority, or public district; providing for the filing of said oath or affirmation; providing that no fee shall be charged for administering said oath; prohibiting payment to any public officer or employee who has not taken said oath; providing that the taking of a false oath or affirmation shall be a felony and prescribing the penalty therefor; providing that any public officer or employee who after taking said oath or affirmation advocates or becomes a member of an organization advocating overthrow of the United States by unlawful means shall be guilty of a felony and prescribing the penalties therefor; repealing 51 O.S. 1941, § 32, as amended by § 1, Chapter 1, Title 51, Session Laws, 1945; and declaring an emergency.

"Be it enacted by the people of the State of Oklahoma:

"SECTION 1. Every officer and every employee of the State, county, school district, municipality,

public agency, public authority, or public district shall within the first thirty (30) days after taking office, or within the first thirty (30) days of such employment, take and subscribe to the oath or affirmation required by this Act. Persons now holding any such public office or public employment shall take said oath within thirty (30) days from the the effective date of this Act; provided, that public officers or public employees who are on authorized leave on the thirtieth (30th) day after the effective date of this Act shall take and subscribe said oath or affirmation within thirty (30) days after returning to work or to the duties of the office held by such person. Any officer or employee of the State, county, school district, municipality, public agency, public authority, or public district who fails to take and subscribe the oath or affirmation required by this Act within the time specified in this Section, shall forfeit his or her office or employment.

"SECTION 2. The oath or affirmation required by this Act shall be the following:

> I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.
>
> And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlaw-

ful means; that I am not affiliated directly or indirectly with the Communist Party, the Third Communist International, with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; nor do I advocate revolution, teach or justify a program of sabotage, force or violence, sedition or treason, against the Government of the United States or of this State; nor do I advocate directly or indirectly, teach or justify by any means whatsoever, the overthrow of the Government of the United States or of this State, or change in the form of Government thereof, by force or any unlawful means; that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, the Third Communist International, or of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization, or of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means.

And I do further swear (or affirm) that during such time as I am .....

(Here put name of office.

.....

or, if an employee, insert 'an employee of' followed by the complete designation of the employing officer, office, agency, authority, commission, department or institution.)

I will not advocate and that I will not become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means.

Subscribed and sworn to before me this the ..... day of ....., 19.....

Notary Public, or other officer authorized to Administer Oaths or Affirmations.

The above provisions shall be cumulative to other requirements made by law.

"SECTION 3. The oath or affirmation required by this Act shall be filed by the officer or employee executing it with the officer, board, authority or commission having control of the office, agency, authority, department, commission, or institution in or for which the person executing the oath or affirmation is employed or appointed or to which said person is elected; and the officer, board, authority or commission having such control shall, in the case of a state office, agency, department, authority, or institution, file same with the Secretary of State, together with the oath or affirmation or oaths or affirmations of the said controlling officer, board, authority, or commission, and in the case of a county, school district, or municipal office, agency, authority, department or institution, such oaths or affirmations shall be filed by the controlling officer, board,

agency, authority, or commission with the county clerk. Every such controlling officer, board, agency, authority, or commission shall keep an official record of all such oaths or affirmations received by him or it, and filed with the Secretary of State or county clerk, as the case may be, as required by this Section.

"SECTION 4. The oath or affirmation may be taken before any officer authorized to administer oaths or affirmations. No fee shall be charged by any person before whom the oath or affirmation is taken and subscribed.

"SECTION 5. No compensation nor reimbursement for expenses incurred shall be paid to any public officer or employee by any public agency unless such officer or employee has taken and subscribed to the oath or affirmation required by this Act. It shall be the duty of the person certifying to public pay rolls to ascertain and certify that every officer or employee thereon has taken such oath or affirmation.

"SECTION 6. Every public officer or employee who, in taking and subscribing to the oath or affirmation required by this Act, states as true any material matter which he knows to be false, is guilty of perjury, and is punishable by imprisonment in the State prison not less than one (1) nor more than fourteen (14) years; and in addition thereto, shall forfeit any public office or employment held by such person.

"SECTION 7. Every public officer or employee having taken and subscribed to the oath or affirmation required by this Act, who, while holding such office, or while in the employment of, or service with, the State or any county, city, school district, municipality, public agency, public authority, or public district, advocates or becomes a member of any party or organization, political or otherwise, that advocates the overthrow of the United States or of the State of Oklahoma by force or violence or other

unlawful means, is guilty of a felony and is punishable by imprisonment in the State prison not less than one (1) nor more than fourteen (14) years; and in addition thereto, shall forfeit any public office or employment held by such person.

"SECTION 8. Section 32, Title 51, Oklahoma Statutes 1941, as amended by Section 1, Chapter 1, Title 51, Oklahoma Session Laws, 1945, is hereby repealed.

"SECTION 9. If any provision of this Act, or any word, phrase, clause, sentence, or other portion of the oath or affirmation set out in Section 2 of this Act, or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other portions, provisions or applications of this Act, or of said oath or affirmation, which can be given effect without the invalid portion, provision or application; and to this end the provisions of this Act, and of said oath or affirmation are declared to be severable.

"SECTION 10. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in full force from and after its passage and approval.

"Passed the House of Representatives the 21st day of March, 1951.

JAMES M. BULLARD
Speaker of the House of Representatives.

"Passed the Senate the 15th day of March, 1951.

JAMES E. BERRY
President of the Senate.

"APROVED by the Governor of the State of Oklahoma the 9th day of April, 1951.

JOHNSTON MURRAY
Governor of the State of Oklahoma.

OFFICE OF SECRETARY OF STATE:

"Received by the Secretary of State this 10th day of April, 1951, at 8:45 o'clock a.m.

By: JOHN D. CONNER

"Correctly Enrolled: WILLIAM L. JONES, Chairman, COMMITTEE ON ENGROSSED AND ENROLLED BILLS."

STATEMENT OF CASE

In making a statement of the case, the statute whose validity is called in question will be hereinafter referred to as the Act, and the oath required by the Act will be hereinafter referred to as the Oath.

This case was instituted in the District Court of Oklahoma County, Oklahoma, hereinafter called the trial court (R. 22), by appellee, Paul W. Updegraff, who filed his Petition as a citizen and taxpayer of the State of Oklahoma, against the Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, who were also plaintiffs in error in the Supreme Court of the State of Oklahoma, to enjoin the payment to all teachers, professors and other employees of the Board of Regents who failed to take and subscribe to the Oath required by the Act within thirty days from April 9, 1951, the effective date of said statute. The Board of Regents, the State Treasurer and the State Auditor, who were defendants in the trial court and represented by

the Attorney General of the State of Oklahoma, filed an Answer, admitting that defendant in error was a proper party to institute the suit, conceding the existence of valid contracts of employment of teachers, professors and other employees, including appellants, in effect during the fiscal year ending June 30, 1951, and alleging that the Act impaired the obligation of said contracts under the Oklahoma Constitution. The appellants, by permission of the trial court, filed separate Petitions of Intervention and, by permission of the court (R. 24), filed a consolidated Petition, alleging among other facts, that:

> "* * * Each intervenor is a citizen and subject of the United States of America and of the State of Oklahoma, a resident of Payne County, Oklahoma, and is now serving Oklahoma Agricultural and Mechanical College as follows: Intervenor Wieman is Assistant Professor of Philosophy; Intervenor Ziebur is Research Assistant for Research Foundation; Intervenor Baum is Assistant Professor of Botany; Intervenor Lee is Associate Professor of Chemistry; Intervenor Correll is Professor of Physics and Chairman of Physical Science; Intervenor Schmoe is a Secretary, and Intervenor Nietz is Assistant Professor of Music, each under a valid contract of employment with the defendant Board of Regents and with the Oklahoma Agricultural and Mechanical College, for a term commencing at a time prior to the effective date of an Act enrolled as House Bill No. 8, and passed by the 23rd Oklahoma Legislature; that said contract extends, according to its term, at least to the end of the current fiscal year; * * * that funds are lawfully available to meet the salary obligations of each of said contracts; that each intervenor has in all things complied with said contract, and has

done all things required by law in the performance thereof, and required by law as a condition precedent and as a condition subsequent to the right to receive compensation thereunder; that said contract does not require intervenor to take any oath of any kind or to do anything mandated by 'the oath' hereinafter referred to, or to refrain from doing anything proscribed by said Oath; that each intervenor has heretofore received payments monthly thereunder up to and including the month of April, 1951; that each intervenor is now ready, able and willing to perform, and is now performing, and will continue to perform services thereunder during the term thereof without interference from the defendant Board of Regents, or from any of its authorized agents; that this intervenor is entitled to receive payments thereunder and is entitled to have defendant Board of Regents direct its authorized agent, and to have the defendant, A. S. J. Shaw, as State Treasurer of the State of Oklahoma, and to [*have*] the defendant, Wilburn C. Cartwright, as State Auditor of the State of Oklahoma, to do any and all things lawfully necessary to be done to effect payment thereunder to this intervenor; and to each intervenor;

"That each intervenor is not a member of any organization, political or otherwise, that advocates, that he has not and will not advocate, the overthrow of the Government of the United States of America or of the State of Oklahoma, by force or violence, or unlawful means;

* * * * *

"That intervenor has not taken the Oath; that each intervenor, except Ziebur and Wieman, conscientiously and sincerely believes that war and the use of force between nations is contrary to the Will of God, and is forbidden by divine law, and that in obedience to these principles, and as a matter of religious faith and obligation, each intervenor, except Ziebur and Wieman, cannot and will not, because

> of his aforesaid religious convictions, bear arms against his fellowman; * * *." (R. 29 and 30).

By way of cross-action to appellee's Petition to enjoin payment to appellants, each appellant adopted the allegations set forth in said consolidated Petition in Intervention and prayed the judgment of the trial court that a mandatory injunction issue, compelling and requiring said Board of Regents, State Treasurer and State Auditor to do everything necessary to effect payment to each appellant for services performed under his contract of employment.

Each appellant alleged that a forfeiture of his contract and a denial of the payments due him under said contract as a result of the application of said statute would violate the constitutional rights of each appellant in several respects hereinafter stated, including the respects specifically set forth and specifically adjudicated by the Supreme Court of the State of Oklahoma. The Supreme Court of the State of Oklahoma considered and passed upon certain constitutional issues.

In deciding what issues were before it, the Supreme Court of the State of Oklahoma, in its decision and opinion, said:

> "Only those propositions asserted which are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors will be discussed." 237 P. 2d 131, 134; R. 61.

The Supreme Court of the State of Oklahoma entertained and considered specifically the contention of each appellant that the statute impairs the obligation of contract, contrary to Article 1, Section 10 of the Constitution of the United States. The court said in part:

> "The Act does not impair obligation of contract contrary to Article II, Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States.
>
> " 'All parties dealing with a sovereign power, or one of its functionaries, in the exercise of governmental power, the subject of which pertains to government (schools in this case), do so knowing it cannot contract * * * the power conferred for self-protection of self-preservation. The rule, therefore that the Legislature can pass no law impairing the obligation of contracts does not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public.' " 237 P. 2d 131, 137; R. 66.

In passing upon the contention of each appellant that said statute took liberty and property without due process of law, the Supreme Court of the State of Oklahoma said in part:

> "The statute and the required loyalty oath do not deprive public officials and employees of property or liberty without due process of law. The intervenors are employees of the State as teachers in a public institution. They have no constitutional right to be so employed. They have no right to so serve the State except upon such terms as the State prescribes. The Act does not purport to take away their right

to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them. *People* v. *Crane*, 214 N.Y. 154, 108 N.E. 427, L.R.A. 1916D, 550; *Heim* v. *McCall*, 239 U.S. 175, 36 S. Ct. 78, 60 L. Ed. 206, 207; *Ellis* v. *U. S.*, 206 U.S. 246, 27 S. Ct. 600, 51 L. Ed. 1047; *McAuliffe* v. *Mayor, etc. City of New Bedford*, 155 Mass. 216, 29 N.E. 517." 237 P. 2d 131, 137; R. 67.

In passing upon the contention of each of the appellants who entertain religious convictions against bearing arms, and that as to them said statute violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, the Supreme Court of the State of Oklahoma said:

"It is alleged by some conscientious objectors that the required loyalty oath invades their freedom of religion guaranteed by both the State and Federal Constitutions. The part of the oath which it is alleged so invades this guaranty is 'that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary' (that is, if by valid law required). The provisions of the Constitution against the enactment of any law prohibiting the free exercise of religion 'embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.' *Cantwell* v. *State of Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 903, 84 L. Ed. 1213. * * * The required oath does not invade one's constitutional right to the free exercise of religion guaranteed by Article I, Section 2 of the Oklahoma Constitution and the First Amendment of the Federal Constitution. For interesting reading on the subject see *Wooley* v. *Watkins*, 2

Idaho, Hasb., 590, 22 P. 102." 237 P. 2d 131, 138; R. 67.

In passing upon whether or not said statute constituted a bill of attainder in violation of Article I, Section 10 of the Constitution of the United States, the Supreme Court of the State of Oklahoma said:

> "An *ex post facto* law is one which provides a punishment for an act which was innocent when committed. Punishment is a necessary incident to either a bill of attainder or an *ex post facto* law. Punishment such as contemplated by the inhibiting clauses of the State and Federal Constitutions is not present here. The act is neither a bill of attainder nor an *ex post facto* law." 237 P. 2d 131, 138; R. 68.

In deciding that the requirements of the Act were reasonably related to its purpose, the Supreme Court of the State of Oklahoma, in summation, said:

> " ** * The Legislature had the power and duty to prescribe qualifications for teachers in our public institutions. The loyalty oath required as a prerequisite to payment for teaching in our public institutions cannot be said as a matter of law to be unreasonable, arbitrary, and capricious or to violate any constitutional rights guaranteed by either the State or Federal Constitutions. All parts of the loyalty oath required appear to be reasonably related to the purposes of the Act." 237 P. 2d 131, 138; R. 69.

The Supreme Court of Oklahoma completely ignored and refused to pass upon the constitutional issue raised in the 5th Assignment of Error (R. 93). This assignment pertains to Baum, Lee, Correll, Schmoe and

Nietz, who sincerely believe it is against the Will of God for one to bear arms against his fellowman. They asserted in their consolidated Petition in Intervention (R. 25, 28), in their Motion for New Trial (R. 45, 46), in their Petition in Error (R. 12, 15), and in their Motion for Rehearing (R. 70, 83), that the Act perforce the requirements of the Oath violated Article 1, Section 8 of the Constitution of the United States, delegating to the Congress the exclusive power to raise and support armies and provide and maintain a navy.

Additionally, the Supreme Court of the State of Oklahoma refused to consider and pass upon the issues raised in the 6th and 7th Assignments of Error, wherein the named appellants assert it denies each of them liberty and property without due process of law, to fail to extend to each of them the opportunity to take the Oath as interpreted (R. 93 & 94). This issue was raised in the Petition for Rehearing (R. 70, 77).

The record upon which the Oklahoma Supreme Court based its decision was made by stipulations entered into in writing between all parties, before the trial, and entered into orally during the trial in the trial court. The following are material parts of a stipulation (R. 42) entered into in writing and filed in the trial court and introduced as evidence:

> "It is hereby stipulated and agreed by and between the plaintiff, defendants and intervenors in the above cause that the plaintiff is a taxpayer and

citizen of the State of Oklahoma; that the teachers and professors referred to in the pleadings herein were employed by the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges prior to April 9, 1951, to teach in the colleges referred to in the pleadings for and during the school year ending on or prior to June 30, 1951; that the other employees referred to in the pleadings were employed by the defendant, Board of Regents, prior to April 9, 1951, to perform services in the colleges referred to in the pleadings for prescribed periods exceeding thirty (30) days, but not necessarily for the entire school year 1950-51; that said employments were made by virtue of recommendations of employment by the Presidents of said colleges to the defendant, Board of Regents, which recommendations were approved or ratified by the Board after the beginning of the fiscal year ending June 30, 1951, after which said teachers, professors and employees entered into the duties of their respective employments, all of which is reflected in the official minutes of the board; that no written contracts of employment were executed by said teachers, professors and employees with said Board of Regents, except as the above procedure may constitute the execution of such contracts; * * * that the procedure above outlined is in accord with the customary and traditional practice of said board in effecting the employment of teachers, professor[s] and employees in said colleges; that funds are now lawfully available to pay the salaries of said teachers, professors and employees during the fiscal year ending June 30, 1951; that said teachers, professors and employees, including intervenors, have in all things complied with their respective employments and have done all things required by law in the performance thereof as a condition precedent and as a condition subsequent to the right to receive compensation therefor, except that same have not taken the oath set forth in Section 2 of House Bill No. 8 of the Twenty-

third Oklahoma Legislature; that said teachers, professors and employees, including intervenors, have heretofore received payment under their respective employments up to and including the month of April, 1951, and are now ready, willing and able to perform services under their respective employments; and that the intervenors, Baum, Correll, Hunt [Lee], Schmoe and Nietz hold religious convictions against bearing arms against their fellowmen.

* * * * *

"It is also stipulated that A. S. J. Shaw is the duly elected, qualified and acting State Treasurer of Oklahoma; that Wilburn C. Cartwright is the duly elected, qualified and acting State Auditor of Oklahoma; that the compensation of the teachers, professors and employees referred to in the pleadings is largely paid from State funds; * * *

"Dated this 17th day of May, 1951.

PAUL W. UPDEGRAFF,
Attorney for Plaintiff;

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;

FRED HANSEN,
First Assistant Attorney General,
Attorneys for Defendants.

EMERY & EMERY,
By ROBERT J. EMERY,
DON EMERY,
Attorneys for Intervenors."

All parties also stipulated (R. 40) as follows:

MR. EMERY: "* * * May it be admitted by the Attorney General and counsel for the plaintiff, that each of the intervenors do not advocate and do not belong to any organizations that

advocate the overthrow of the Government of the United States or the State of Oklahoma by force and violence?

MR. UPDEGRAFF: No, I won't say that. I will say that each of them, if here to testify, would so testify.

MR. EMERY: Then, that their testimony as to the facts alleged in their consolidated petition in intervention may be considered as testimony in this case, as to all facts so alleged, without any challenge as to its competency?

MR. UPDEGRAFF: That's right.

MR. HANSEN: That is satisfactory.

THE COURT: If I understand you gentlemen correctly, there is no contention that any of these parties are Communists?

MR. UPDEGRAFF: No. We don't say that at all.

MR. EMERY: There is no contention as to that.

THE COURT: And, they have refused to sign this oath because they are unwilling to bear arms in defense of the United States.

MR. EMERY: That is one of the grounds, but there are several other grounds. The issues are much deeper than that.

MR. UPDEGRAFF: I don't stipulate that none of these people are Communists. I stipulate only that if they were put on the witness stand they would so testify, and their testimony to that effect be considered as evidence in this case."

The verified consolidated Petition was offered in evidence as proof of the facts therein alleged by agreement of all parties at the trial and was by the trial court admitted in evidence (R. 41).

All appellants, except Ziebur, took and subscribed to all parts of the oath as set forth *in haec verba* in the decision and opinion of the Supreme Court of the State of Oklahoma (R. 62).

The District Court in its judgment made the following findings of fact (R. 52):

> "The Court finds the facts in this case to be as set forth in the stipulations entered into by and between the parties, and that the parties have agreed that the case comes on for hearing on the permanent injunction."

By virtue of the trial court's findings of fact, it found as facts, all facts alleged in the consolidated Petition, and all facts set forth in the written stipulation and the stipulations made during the trial. This included the finding of the trial court,

> "* * * that each intervenor is not a member of any organization, political or otherwise, that advocates, that he has not and will not advocate the overthrow of the Government of the United States of America or of the State of Oklahoma, by force or violence or other unlawful means * * *."

The judgment of the trial court, among other matters, embraced the following:

> "6th
>
> "The Court concludes that the intervenors, and each of them, did not take and subscribe to the Oath as provided in Section 2 of the Act and wilfully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered." (R. 54).

"It Is Therefore Ordered, Adjudged and Decreed by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and the intervenors. * * *" (R. 57).

SPECIFICATIONS OF ERROR INTENDED TO BE URGED

1. The Supreme Court of the State of Oklahoma erred in failing to hold that a statute of the State of Oklahoma, namely, Enrolled House Bill No. 8, 23rd Legislature [Laws 1951; 51 O.S. 1941 (Supp.) 37.1-37.8], violated the constitutional rights of each of the appellants, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts (R. 90). Argued as Point VII.

2. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute

prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of the said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment, of each appellant, thus constituting said statute a bill of attainder, contrary to Article 1, Section 10 of the Constitution of the United States, providing that no State shall pass a bill of attainder (R. 91). Argued as Point I.

3. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of the said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a

communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment of each appellant, thus depriving each appellant of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States providing that no State shall deprive any person of life, liberty or property without due process of law (R. 92). Not argued as a separate point.

4. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of said statute that he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment, of each appellant, thus having no reasonable relation to the purpose of said statute and thus depriving each appellant of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law (R. 92). Argued as Point II.

5. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute which, among other things, required that each appellant swear that he "will take up arms in defense of the United States in time of war or national emergency, if necessary" ("if necessary" was construed by said court to mean "if by valid law required"), in that the operation and effect of said statute as set forth above violates Article I, Section 8 of the Constitution of the United States, delegating exclusively to the Congress the power to raise and support armies and provide and maintain the navy, by interfering with the enforcement of a complete, comprehensive and fully integrated scheme enacted by the Congress as the Selective Service Act of 1948, and in effect at the time of the enactment of said statute (R. 93). Argued as Point IV.

6. The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath is so vague that men of common intelligence must guess at its meaning and differ as to its application, thus rendering the operation and effect of said statute as set forth above a deprivation of liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without

due process of law. The respects in which the Oath is vague appear, by virtue of the construction of the language of the Oath by the Supreme Court of Oklahoma in its said judgment and decision, as follows:

(a) By construing that "I am not affiliated directly or indirectly with * * * any foreign political agency, party, organization or government" as meaning any foreign political agency, party, organization or government officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization.

(b) By construing the language of the Oath, "that I am not affiliated directly or indirectly with" to mean "that I am not affiliated directly or indirectly with at the time of the passage of the Act."

(c) By construing the language of the Oath, "that within five (5) years immediately preceding the taking of the oath I have not been a member," to mean within the five years immediately preceding the passage of the Act, without regard to when the Oath is taken.

(d) The language of the Oath, "that I will take up arms in defense of the United States in time of War, or National Emergency, if necessary," means, in respect of the words, "if necessary," if by valid law required (R. 93). Argued as Point V.

7. The Supreme Court of Oklahoma committed error in failing to extend to each appellant, as a condition precedent to its affirmance of the judgment of the District Court of Oklahoma, the privilege of taking the Oath in the light of its construction of said statute as set forth in Assignment of Error No. 6. That such error constituted a violation of the constitutional rights of each appellant by taking his liberty and property without due process of law, in violation

of the Fourteenth Amendment to the Constitution of the United States (R. 94). Not argued.

8. The Supreme Court of the State of Oklahoma erred in failing to hold said statute violated the constitutional rights of appellants, Lee, Correll, Nietz, Schmoe and Baum, each holding sincere religious conviction opposing the bearing of arms against his fellow man, which statute prohibited payment of accrued salaries to each of said appellants, due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each of said appellants to subscribe and file the Oath with designated authorities required by said statute, which Oath, among other things, is to the effect that each of said appellants swear that he will take up arms in defense of the United States in time of war or national emergency, if necessary, in that the operation and effect of said statute, as set forth above, constitutes a law respecting the free exercise of religion, contrary to the Fourteenth Amendment to the Constitution of the United States providing that no State shall deprive any person of life, liberty or property without due process of law (R. 95). Argued as Point III.

SUMMARY OF ARGUMENT

The specifications of error will be presented in the order in which they appear in this summary of the argument, rather than in the order in which they appear as assignments of error in the Transcript of Record. This change, indicated in the record under each specification of error, is made in aid of a clearer presentation of the issues.

The following statement of facts is relevant to all points:

The Oklahoma law under attack, hereinafter called the Act, appearing in this Brief on Page 3, *et seq.*, is Enrolled House Bill No. 8, 23rd Legislature [Laws 1951; 51 O.S. 1941 (Supp.) 37.1-37.8].

The Act required, among other things, that public employees, including appellants, take an oath, hereinafter called the Oath. The only part of the Oath here under attack is a part of the second paragraph, which is the paragraph omitted in the *verbatim* statement of "the Oath" appearing in the opinion of the Supreme Court of Oklahoma (R. 62). The part of the second paragraph of the Oath under attack is:

> "* * * That I am not affiliated directly or indirectly * * * with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; * * * that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of * * * any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization. * * *"

The Act provided that employees of the State, or an agency or subdivision thereof, including appellants, suffer two penalties for a failure to take the Oath within

30 days after the passage of the Act or after accepting employment. Section 1 provides for forfeiture of employment (this Brief, Page 3) and Section 5 prohibits the payment of compensation for such failure (this Brief, Page 7).

The District Court of Oklahoma County, Oklahoma, hereinafter called the trial court, forfeited the contracts of employment of appellants and denied them compensation accrued to the day of judgment (May 21, 1951) for failure to take the Oath (R. 54, 6th), and on such basis denied appellants mandatory injunctive relief requiring the Board of Regents of Oklahoma Agricultural Colleges, the State Auditor and the State Treasurer, to pay each appellant compensation under his contract of employment. The Supreme Court of Oklahoma affirmed the judgment of the trial court (R. 59, 69).

Substantially the same facts under the pleadings and proof in this case are relevant to all points, except that five appellants, namely, Lee, Correll, Schmoe, Nietz and Baum, refused to take the Oath, for the additional reason that they held sincere religious convictions contrary thereto, in that each believed it to be contrary to the Divine Will of God that he bear arms against his fellowman; whereas the Oath required a sworn promise to bear arms (R. 30-31).

Each appellant was an employee of the Oklahoma Agricultural and Mechanical College by virtue of a con-

tract made and entered into between each appellant and the Board of Regents for the College, prior to the effective date of the Act. The contract of employment, at a stipulated salary, of each appellant extended at least until the end of the then current fiscal year (June 30, 1951) (R. 25 & 41). At the time of the execution of each contract, no oath was required. Each appellant was ready, able and willing to perform his contract and did, with the consent of the Board of Regents, render services thereunder until the day of judgment, May 21, 1951 (R. 26), when each had his contract forfeited and each was denied accrued compensation for services rendered thereunder. Each appellant did all things required by law in the performance of his contract as either a condition precedent, or as a condition subsequent to his right to receive compensation thereunder, except that he did not take the oath for the reasons hereinafter stated (R. 26 & 43).

On the basis of the foregoing record, appellants contend:

POINT I

The Act, inflicting punishment of forfeiture of contract and denial of compensation, without judicial trial, is a bill of attainder, in violation of Article I, Section 10 of the Constitution of the United States, providing that no State shall pass a bill of attainder.

The Act as indicated above, by virtue of the requirements of the Oath, compelled each appellant, under the pain of forfeiture of his contract of employment and a denial of compensation earned thereunder, to foreswear membership within the last five years in any organization proscribed by the Attorney General of the United States as a communist front or subversive. Prior to its construction by the Supreme Court of the State of Oklahoma the Act apparently meant that the five-year period was a period immediately preceding the taking of the Oath. Under the interpretation of the Supreme Court of the State of Oklahoma, it is made clear that the Attorney General's determinations are only those made prior to the effective date of the Act, but it is not clear under this interpretation whether the jurator is required to foreswear his past membership during a five-year period immediately preceding the effective date of the Act or his past membership for five years immediately preceding the taking of the Oath (R. 63, 64). No opportunity is afforded to explain the circumstances of past membership or to rebut the presumption of disloyalty thus created. The presumption is conclusive.

As applied and enforced, bills of attainder are,

> "* * * legislative acts * * * that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment upon them without a judicial trial. * * *"
>
> *United States* v. *Lovett*,
> 328 U.S. 303, 315.

The Act is a Legislative Act

The Act Applies to Easily Ascertainable Members of a Class

Appellants are professors and employees of Oklahoma Agricultural and Mechanical College.

The Act Inflicts Punishment

The punishment inflicted is a forfeiture of contract of employment under Section 1 of the Act, and a denial of compensation for services performed under Section 5 of the Act. *United States* v. *Lovett, supra,* holds that cutting off pay is the kind of punishment essential to attainder.

The Act Inflicts Punishment Without a Judicial Trial

The trial court forfeited the employment contracts of appellants and denied each of them accrued compensation perforce Section 5 of the Act. This action was taken in making effective the punishment of the Act without affording appellants any opportunity to explain past membership after due notice and hearing, and by virtue of the conclusive presumption of disloyalty created by the Act as a result of past membership.

Cummings v. *Missouri,* 4 Wall. 277.

The attainder is more oppressive than it might otherwise be in that in the light of the subsequent interpretation given the Oath by the Oklahoma Supreme Court. Each appellant, as of the time he was required to take

the Oath, could only guess in what particular five-year period, if any, the proscriptions of membership were to have occurred. Additionally, as of the time of taking the Oath, he could only guess that the foreign agencies and governments in which membership was proscribed were to be only those foreign agencies and governments proscribed by the Attorney General. This interpretation of the Supreme Court of Oklahoma would have been, at the time, a bad guess; because the Attorney General had not then, so far as appellants knew, and has not to this day proscribed any foreign governments, including the Union of Soviet Republics, as a subversive government. Moreover, the appellants, holding religious convictions against bearing arms, could only guess that the words "if necessary" meant "if by valid law required."

Connally v. *General Construction Co.*, 269 U.S. 385.

POINT II

The forfeiture of appellants' contracts and the denial of accrued compensation thereunder for failure to take the Oath, denies appellants liberty and property without due process of law, because certain requirements of the Oath bear no reasonable relation to the purpose of the Act.

A denial of the right to perform a valid contract of employment and enjoy the fruits of such performance,

is a denial of liberty and property under the Fourteenth Amendment.

Prudential Life Ins. Co. v. *Cheek*, 259 U.S. 530, 536.

The purpose of the Act, according to the Oklahoma Supreme Court, is to make loyalty a qualification for public employment. In this connection, the requirement of the Oath that one foreswear past membership in organizations proscribed by the Attorney General as communist front or subversive, makes such past membership a conclusive presumption of disloyalty. Thus, each appellant had his contract forfeited and his accrued compensation due thereunder denied without being afforded an opportunity to rebut the presumptions of disloyalty, and to show that his membership was consistent with his loyalty. This was not a reasonable exercise of the protective powers of the State and gave the requirements of the Act an unreasonable relation to its purpose. Under such circumstances, the opportunity to rebut the presumption of guilt by past association is the very essence of due process, and the denial of this opportunity was a denial of due process secured by the Fourteenth Amendment.

Adler et al. v. *Board of Education of the City of New York*, ... U.S. ....., 72 S. Ct. 380;

Joint Anti-Facist Refugee Committee v. *McGrath, Attorney General of the United States et al.*, 341 U.S. 123, 137-139;

Coe v. *Armour Fertilizer Works*,
37 U.S. 413, 424;
Western & A.R.R. v. *Henderson*,
279 U.S. 639, 640;
Manley v. *State of Georgia*,
279 U.S. 1, 7.

POINT III

The Act, as applied to appellants, Lee, Correll, Schmoe, Nietz and Baum, each of whom sincerly believes that bearing arms against one's fellow man is contrary to divine law, by requiring each of them to promise under oath to bear arms, denies each named appellant his liberty without due process of law, contrary to the Fourteenth Amendment; because as to the named appellants, the Act is a law respecting the free exercise of religion.

The Act takes liberty by denying the free exercise of religion guaranteed by the Fourteenth Amendment, because the Act interferes with the free exercise of religion — it forfeits contracts and denies compensation thereunder for failure to take the Oath required by the Act. The Act interferes with the free exercise of religion, because self-enforced abstinence from conduct believed by the abstainer to be contrary to divine will is the practice of a religion. This interference occurs perforce the requirement of the Act, under the compulsions of the Act's penalties, that each appellant swear that he will take up arms in the defense of the United States in time of war or national emergency, if necessary.

The free exercise of religion protected by the First Amendment is protected by the Fourteenth Amendment.

Cantwell et al. v. *State of Connecticut*, 310 U.S. 296, 303.

Self-enforced abstinence from certain conduct in response to divine law is as much a religious practice as an affirmative act.

West Virginia State Board of Education et al. v. *Barnett et al.*, 319 U.S. 624, 638-639.

Freedom to follow religious practices by engaging in affirmative conduct and act is protected by the Fourteenth Amendment.

Niemotko v. *State of Maryland*, 340 U.S. 268;
Taylor v. *State of Mississippi*, 318 U.S. 583;
Murdock v. *Commonwealth of Pennsylvania*, 319 U.S. 105.

While presumptions are indulged in support of the constitutionality of State action as a general rule, an exception is State action interfering with the freedom to exercise one's religion in submission to what is sincerely believed to be divine will. In such a case, a State cannot constitutionally interfere unless it is to protect the health, peace or morals of the people of the State against a clear and present danger.

There is no legislative finding that a refusal to take an oath to bear arms on the part of public employees,

in any branch of the State Government or its administration in Oklahoma, who are religiously opposed to bearing arms, presents a clear and present danger to the interest of the people of the State that the State is competent constitutionally to protect. Nothing appears in the record to warrant such an assumption. In this connection reference is made to Judge Learned Hand's test adopted by this Court in *Dennis* v. *United States*, 341 U.S. 494, 510:

> "In each case [courts] must ask whether the gravity of the 'evil,' discontinued by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

There is no support in the history of the Act to warrant a conclusive presumption of disloyalty arising from one's failure, due to his religious conviction, to take an Oath to bear arms. Such a conclusive presumption does not bear any reasonable relation to the prevention, the thwarting or the frustration of any clear and present danger. Appellants' position in this regard is supported by the fact that the Congress, prior to the enactment of this Act, had passed the Selective Service Act of 1948 (62 Stat. 604, *et seq.)*, and later in 1951, enacted the Universal Military Training and Service Act (50 U.S.C.A., App. Sec. 451, *et seq.)*, exempting persons in the class of the named appellants from combat service, and under certain conditions, from non-combat military service.

POINT IV

The Act perforce the requirements of the Oath as applied to Lee, Correll, Schmoe, Nietz and Baum, in requiring each of them to take an oath to bear arms, when each holds sincere religious convictions contrary thereto, constitutes an unconstitutional interference with the exclusive powers of the Congress to raise and support armies and provide and maintain a navy, under Article 1, Section 8 of the Constitution of the United States, when antecedently to the passage of the Act the Congress, by law, had exempted such persons from the duty to bear arms.

The Act required an oath which, among other things, was to the effect that the jurator would promise to bear arms in the defense of the United States in time of war or national emergency, if necessary. Prior to the passage of the Act (April 9, 1951), the Congress of the United States had enacted the Selective Service Act of 1948, which, by Section 456(j) thereof exempted persons in the class of the named appellants from bearing arms. This same exemption appears in the Universal Military Training and Service Act passed by the Congress in 1951 [50 U.S.C.A., App. Sec. 456(j)]. In fact, such persons may, under prescribed circumstances, be exempted from non-combat military service. For the enforcement of this provision; in fact, for the enforcement of its entire scheme for military service, the Congress has enacted a complete, comprehensive and fully integrated scheme.

It is the contention of appellants that the requirement of the Oath that each swear to bear arms in defense of the United States frustrates the purposes and objectives of the Congress in exempting such persons from military service. *Hines, Secretary of Labor and Industry of Pa. et al.* v. *Davidowitz et al.*, 312 U.S. 52, 61, 67, 68 & 74. The subsequent interpretation by the Oklahoma Supreme Court to the effect that "if necessary" means "if by valid law required," did not save the Act from the unconstitutional interference with Congressional Policy.

POINT V

The Act perforce the requirements of the Oath denied appellants liberty and property without due process of law, in violation of the Fourteenth Amendment, by forfeiting contracts of employment and by denying payment of accrued compensation thereunder, because appellants failed to take the Oath when such failure was due to a serious and reasonable doubt as to its meaning.

Doubtless, men of ordinary intelligence, in the light of certain interpretations made by the Supreme Court of Oklahoma, could only guess at the meaning of the Oath and differ as to its application. *Connally* v. *General Construction Co.*, 269 U.S. 385. In fact, in the respects hereinafter set forth each appellant could not know the existence or non-existence of certain facts he was required

to foreswear, or the nature of the promise he was required to make.

Even though these same ambiguities may have been the basis of a defense to a charge of perjury instituted under Section 1 of the Act, the violation of which carried from one to fourteen years imprisonment, the appellants nevertheless would still be sorely perplexed as to the meaning of the language. This point is also made in reference to the following declarations in the Oath, regarded as ambiguous in the light of a subsequent interpretation by the State court or independently thereof. The Oath required a declaration "that I am not affiliated directly or indirectly * * * with any agency, party, organization, association or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization." Although the jurator is required to survey his present membership under this language, the Supreme Court of Oklahoma held that it referred only to determinations made prior to the passage of the Act.

The Oath also declared "that within five (5) years immediately preceding the taking of this Oath (or affirmation) I have not been a member * * * of any agency, party, organization, association or group whatever which has been officially determined by the United States Attorney General * * * to be a communist front or subversive organization." Here, again, the language requires

the jurator to survey the immediate present, both as to his membership and as to the Attorney General's determinations. Under the Oklahoma Supreme Court's interpretation, it is only those determinations made prior to the passage of the Act which are embraced; but it is still doubtful, under the interpretative language of the Oklahoma Supreme Court whether the jurator is to make a declaration about his present membership for five years immediately preceding the taking of the Oath, or for five years immediately preceding the effective date of the Act. Finally, the named appellants, holding a sincere religious conviction that bearing arms is contrary to divine will, were required to know that the words "if necessary" meant "if by valid law required." This part of the Oath required the jurator to swear that "I will take up arms in defense of the United States in time of War or National Emergency, if necessary."

POINT VI

The Act perforce the requirements of the Oath impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, in that the statutory forfeiture of said contract and the denial of the accrued compensation thereunder is effected by an unreasonable exercise of the reserved protective power of the State.

The contract of each appellant, not requiring any oath, was executed prior to the passage of the Act requiring the Oath (R. 25).

The obligation of the contract of each appellant was impaired as a matter of fact.

The impairment occurred perforce the provisions of Section 1 of the Act, which by legislative fiat forfeited the contract for failure to take the Oath as required by the Act, and again by Section 5 of the Act which denied the payment of compensation under contracts in effect prior to the time of the passage of the Act for the failure to take the Oath, as required by the Act. These provisions of the Oath were enforced by the trial court in its 6th Conclusion of Law (R. 54). The appellee Board of Regents was enjoined from paying appellants. In stating the legal results of the failure of each appellant to take the Oath, the trial court concluded "by reason thereof the Board of Regents is enjoined from paying them and their employment is terminated. It is so ordered" (R. 54). On this basis, the trial court denied injunctive relief seeking payment of accrued compensation (R. 57). The judgment of the Supreme Court of Oklahoma was:

> "The judgment denying injunctive relief to intervenors [appellants] on their cross-petitions is affirmed" (R. 69).

The contract of each appellant is protected by Article 1, Section 10 of the Constitution of the United States providing that no State shall pass any law impairing the obligation of contracts. A contract with an agency of the State, especially when it constitutes an

obligation to pay money, enjoys the protection of Article 1, Section 10.

Hall v. *State of Wisconsin*,
103 U.S. 302.

"When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly."

103 U.S. 302, 305.

See, also:

State of Mississippi for Use of Robertson v. *Miller et al.*, 276 U.S. 174, 178-179.

The contract obligation of each appellant is impaired in a constitutional sense, because the impairment results from an unreasonable exercise of the reserved protective power of the State.

The exercise is an unreasonable one, because the Act perforce the declarations of the Oath makes membership within five years immediately preceding the taking of the Oath in groups determined to be communist front or subversive by the Attorney General of the United States a conclusive presumption of disloyalty, affording each appellant no opportunity after notice and hearing to rebut such presumption. No appellant was afforded any opportunity to show that his membership may have been in an organization which was not subversive at the time of his affiliation, but later became subversive. He was denied the oppottunity to show that his affiliation occurred innocently. He was denied the opportunity to

show that a proscribed organization, originally subversive, was purged of its subversive character. He was denied an opportunity to show that after learning of the subversive character of an organization, he severed his membership.

Adler et al. v. *Board of Education of the City of New York, supra;*
Western & A.R.R. v. *Henderson, supra;*
Manley v. *State of Georgia, supra;*
State of Indiana ex rel. Anderson v. *Brand*, 303 U.S. 95.

The Act constitutes an unreasonable exercise of State power as to Lee, Correll, Schmoe, Nietz and Baum, who believe it to be contrary to divine will to bear arms. The Act makes the failure of such persons to swear to bear arms a conclusive presumption of disloyalty. This is especially unreasonable in view of the antecedently established policy of the Congress in the Selective Service Act of 1948 (62 Stat. 604, *et seq.)*, and again in the Universal Military Training Service Act (1951) (50 U.S.C.A., App. Sec. 451, *et seq.)*, exempting such persons as the named appellants from military service.

The Act is an unreasonable exercise of State power, because appellants, due to the ambiguities in the Act delineated under Point V, were unable to determine the five-year period within which membership created a conclusive presumption of disloyalty. If it were the five-year period immediately preceding the taking of the Oath,

each appellant could not know, due to procedures established by the Executive order requiring such determinations, what determinations had been made up to that time.

ARGUMENT

POINT I

The Act inflicting punishment of forfeiture of contract and denial of compensation without judicial trial, is a bill of attainder, in violation of Article 1, Section 10 of the Constitution of the United States providing that no State shall pass a bill of attainder.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of the said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punish-

ment of loss of accrued salaries and forfeiture of employment, of each appellant, thus constituting said statute a bill of attainder, contrary to Article I, Section 10 of the Constitution of the United States, providing that no State shall pass a bill of attainder.

ARGUMENT

The appellants, easily ascertainable members of a group, were employees of the Board of Regents of Oklahoma Agricultural Colleges, serving the Oklahoma Agricultural and Mechanical College at Stillwater. Each appellant was a citizen of the United States and a citizen of the State of Oklahoma (R. 25). No appellant was a member of any organization, political or otherwise, that advocates the overthrow of the Government of the United States of America, or the State of Oklahoma, by force or violence, or unlawful means; and no appellant had ever engaged in such advocacy (R. 26). Prior to the passage of the Act (April 9, 1951), each appellant had made and entered into a valid contract of employment with the Board of Regents and was rendering service thereunder (R. 25 & 42). His contract extended at least until the end of the then current fiscal year, June 30, 1951 (R. 25). Each appellant had in all things complied with his contract, had done all things required by law in the performance thereof, either as a condition subsequent, or as a condition precedent to the right to receive compensation (R. 43). No complaint, so far

as this record is concerned, was ever made against the conduct of any appellant. The contract under which each was rendering services did not require the taking of any oath; or the doing of anything required or prohibited by the Oath (R. 26). Each appellant continued with the consent of the Board of Regents to render services under such contract until May 21, 1951, which was the day of judgment, that enjoined the payment of compensation for services performed, that denied each appellant injunctive relief to compel the payment of compensation for services rendered, that declared a forfeiture of their contracts of nployment. Each appellant was ready, able and willing to perform, and was in a position to continue to perform the services required by his contract. These facts appear in the Stipulation (R. 42 & 43), and in the verified Consolidated Petition of the appellants (R. 25), which was received in evidence by stipulation of the parties in open court (R. 40). The trial court found these facts to be true. Its Findings of Fact were:

"FINDINGS OF FACT

"The court finds the facts in this case to be as set forth in the Stipulation entered into by and between the parties, and that the parties have agreed that the case comes on for hearing on the permanent injunction" (R. 52).

It is appellants' contention, that, under this record, the necessary operation and effect of the Act as applied

to appellants constituted a bill of attainder, in violation of Article 1, Section 10 of the Constitution of the United States.

Bills of attainder are,

> "* * * legislative acts * * * that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment upon them without a judicial trial. * * *."
>
> *United States* v. *Lovett*,
> 328 U.S. 303, 315.

The Act here involved is a legislative act that applies to easily ascertainable members of a group; namely, employees of a public agency, the Board of Regents of the Oklahoma Agricultural Colleges.

The Act inflicts punishmnt without a judicial trial.

Section 1 of the Act did not contemplate a judicial trial. The mere failure to foreswear past membership in organizations determined to be communist front or subversive by the Attorney General of the United States, worked a forfeiture of office by express declaration in Section 1 of the Act "Any * * * employee of [a] public agency * * * who fails to take and subscribe the oath or affirmation required by this Act within the time specified in this section, shall forfeit his or her office or employment." That the trial court construed the Act as accomplishing its intended results without a judicial trial is emphasized by the circumstance that nowhere in any pleading filed in this case did any party seek a forfeiture

of employment. The trial court applied the statutory forfeiture in its 6th Conclusion of Law:

> "The court concludes that the intervenors, and each of them, did not take and subscribe to the oath as provided in Section 2 of the Act and wilfully refused to take the oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered" (R. 54, 6th).

The Supreme Court of Oklahoma, in denying appellants mandatory injunctive relief, upheld the view of the trial court that the necessary operation and effect of the Act was that its intended results take place without a judicial trial.

Contrary to the holding of the Oklahoma Supreme Court, punishment of each appellant actually occurred for failure to foreswear past membership in the proscribed organizations. Under the Act the appellants were punished, because they refused to foreswear conduct occurring as long as five years prior to April 9, 1951, which embraced time prior to their contract of employment with the Board of Regents. The consequences of the Act were to occur, no matter whether past membership in any proscribed organization occurred in innocence of its evil purposes, or whether the past member, upon discovering its evil purposes, severed his membership, or whether the organization in which membership was proscribed was loyal at the time past membership commenced but later developed its evil design. The Act

offered appellants no opportunity to explain the conditions under which past membership occurred, and no opportunity to destroy the conclusive presumption of disqualification that occurred by reason of past membership, and no opportunity to overcome the presumption of guilt by association. Unlike the opportunities afforded teachers in the public school system in the State of New York by the Feinberg Law, *Adler et al.* v. *Board of Education of City of N. Y.*, ____ U.S. ____, 72 S. Ct. 380, here forfeiture of employment occurred perforce the provision of the Act without notice and a hearing to afford the opportunity to destroy the presumption of disqualification; and without notice and hearing to afford the right of the proscribed organization to explain its purposes.' The conclusive presumption was cast by the enactment of a law beyond the power of appellants to alter or change it. No matter how innocent the past conduct actually was, no matter how appellants may have been supplied with facts to rebut the presumption of disqualification, the facts were of no avail.

For ought that appears from the opinion of the Supreme Court of Oklahoma, the only reason the court did not pronounce the Act to be an attainder was that it held that a forfeiture of the contract of employment or a denial of compensation thereunder did not inflict punishment. The Oklahoma Supreme Court, in erroneously applying *Garner* v. *Board of Public Works of City of Los Angeles*, 341 U.S. 716, said:

"In upholding the ordinance requiring the taking of such an oath and holding that the ordinance was not a bill of attainder the United States Supreme Court said:

> 'We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.'

"An *ex post facto* law is one which provides a punishment for an act which was innocent when committed. Punishment is a necessary incident to either a bill of attainder or an *ex post facto* law. Punishment such as contemplated by the inhibiting clauses of the State and Federal Constitutions is not present here. The act is neither a bill of attainder nor an *ex post facto* law." 237 P. 2d 131, 138.

The Oklahoma Supreme Court failed to discern that in the *Garner* case, the employees of the City of Los Angeles had become such *after* the enactment of a law by the State of California authorizing a municipality to require the oath in question as a condition of employment. It there clearly operated prospectively as a qualification for employment. As Mr. Justice Clark remarked, "not the law but the fact" was posterior. 341 U.S. 716, 721. In the case at Bar the contrary is true—the fact, *i.e.*, the contract of employment is anterior to the law. The conduct working a forfeiture here occurred prior to the passage of the Act. Nothing could be done by those condemned to rebut the conclusive presumption of disqualification in order to prevent a forfeiture of employment, or to preserve the continuing opportunity to re-

ceive compensation for services to be performed under a valid contract.

It is punishment to forfeit a contract conferring the right to perform services for compensation. It is punishment to be denied the payment of compensation for services performed with the consent of the employer; services performed consonant with the position of the Attorney General of the State of Oklahoma, who himself joined these appellants in contending before the Supreme Court of Oklahoma that the Act constituted a bill of attainder.

That this particular kind of punishment constitutes a punishment essential to attainder was held in *United States* v. *Lovett*, 328 U.S. 303.

In the *Lovett case*, it appeared that the Congress prohibited any further payment of compensation to named individuals, although there, as here, the employees were lawfully in the Government service.

The following is the Court's statement of the facts in *United States* v. *Lovett:*

> "In 1943, the respondents Lovett, Watson, and Dodd, were and had been for several years working for the Government. The Government agencies which had lawfully employed them were fully satisfied with the quality of their work and wished to keep them employed on their jobs. Over the protest of those employing agencies, Congress provided in Section 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House bill, that after November 15, 1943,

no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate. 57 Stat. 431, 450. Notwithstanding the Congressional enactment, and the failure of the President to reappoint respondents, the agencies kept all the respondents at work on their jobs for varying periods after November 15, 1943; but their compensation was discontinued after that date. To secure compensation for this post-November 15th work, respondents brought these actions in the Court of Claims." 328 U.S. 303, 304.

In deciding that Section 304 was invalid because it constituted a bill of attainder, in violation of the Constitution of the United States, the Court analyzed and applied *Cummings* v. *Missouri*, 4 Wall. 277, hereinafter mentioned in the argument under this proposition. In concluding that the Act inflicted punishment without a judicial trial, the Court said:

"Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section

> 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a State or by the United States." 328 U.S. 303, 316.

Cummings v. *Missouri, supra,* did not involve a more oppressive technique. There, the United States Supreme Court held an act to be a bill of attainder that required certain classes of persons who had been sympathetic with, or fought with, or aided the side of the South during the Civil War, to swear that they had always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic.

Under Section 9 of the Act, lawyers and clergymen were required to take this oath before they could practice their profession. A Catholic priest refused to take the oath and was indicted.

In explaining why this section of the Missouri Constitution constituted punishment, the Court said:

> "The clauses in the Missouri Constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted; but they produce the same result upon the parties against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. * * * They are aimed at past acts, and not future acts. * * * and they were intended to operate by depriving such persons of the right to hold certain

offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor it is any less so because a way is opened for escape from it by the expurgatory oath. *The framers of the Constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed.* To them there is no escape provided; to them the deprivation was intended to be and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else." 4 Wall. 277, 71 U.S. 356, 364. (Emphasis supplied.)

Dent v. *West Virginia*, 129 U.S. 114, and *Hawker* v. *New York*, 170 U.S. 189, cited with approval in *Garner* v. *Board of Public Works of City of Los Angeles*, 341 U.S. 716, are not in point. In the *Dent case*, a statute was upheld elevating standards of qualification to practice medicine. Any doctor practicing at the time that the Act was passed could continue to practice if he met the new standards. Whether he could meet them or not was well within his own power, subject always to his own control over his own future conduct. In the case at Bar, one must take an oath in reference to past conduct, conduct that cannot now be changed. In the *Hawker case*, a statute of the State of New York was upheld forbidding the practice of medicine by any person who had been convicted of a felony. There the past Act, which conditioned the right to practice medicine in

the future, was unlawful at the time it was committed. In the case at Bar, the acts proscribed occurred before the passage of the Act and worked a forfeiture of contract and a denial of compensation thereunder without regard to the legality of the acts when committed, and without opportunity to rebut the presumptions of disqualification thus created.

POINT II

The forfeiture of appellants' contracts and the denial of accrued compensation thereunder for failure to take the Oath, denies appellants liberty and property without due process of law, because certain requirements of the Oath bear no reasonable relation to the purpose of the Act.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a

communist front or subversive organization, in that the operation and effect of said statute as set forth above inflicts, without judicial trial, the punishment of loss of accrued salaries and forfeiture of employment, of each appellant, thus having no reasonable relation to the purpose of said statute and thus depriving each appellant of liberty and property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law (R. 93).

ARGUMENT

It is repeated again that the failure of each appellant to take the oath required by the Act operated to forfeit his contract of employment and to deny him accrued compensation thereunder (R. 54, 6th). On this basis the trial court's denial of mandatory injunctive relief was affirmed by the Supreme Court of the State of Oklahoma. The contract of each appellant was entered into prior to the passage of the Act and extended at least until June 30, 1951 (R. 25). Each appellant had complied in every respect with all obligations thereunder (R. 25 & 26), and was ready, able and willing to continue his employment, and did, with the consent of the appellee, Board of Regents, render service thereunder until the day of judgment, May 21, 1951.

At the time the contract of each appellant was executed, he was not required to foreswear membership within five years immediately preceding the taking of the Oath in any organization officially determined by the

Attorney General of the United States to be communist front or subversive, nor was it required that he foreswear membership in any organization whatsoever.

It is appellants' contention, under this point, that each appellant is denied liberty and property without due process of law, because the following requirement of the Oath bears no reasonable relation to the purpose of the statute in prescribing loyalty as a qualification for employment by the appellee Board of Regents of the Oklahoma Agricultural and Mechanical College.

The requirement attacked by appellants under this point is that each appellant swear "that within five (5) years immediately preceding the taking of the oath," he was not a member of any group whatsoever which has been officially determined by the United States Attorney General to be communist front or subversive.

While appellants, under this point, urge principally that the conclusive presumption of disloyalty for failure to foreswear past membership precludes a reasonable relationship between the requirements of the Act and its purpose, it is later emphasized under this point that the conclusive presumption thus created becomes more oppressive and thus more unreasonable because appellants were not only required to foreswear past membership in certain organizations, but due to the circumstances of the case and the vagueness of the Oath, they were unable to determine what class of organizations, in respect of

time, was actually contemplated by the Oklahoma Legislature.

Assuming that each appellant could know the period of time within which past membership was fatal, the creation by the Act of a conclusive presumption of present disloyalty due to past membership precludes that reasonable relationship, between the requirement of the Oath and the purpose of the Act, that is necessary to accord due process under the Fourteenth Amendment to the Constitution of the United States.

The Oklahoma Supreme Court, declaring a State Government has the power to continue one's employment on its own terms, found the requirement to bear that reasonable relation to the statutory purpose that the Fourteenth Amendment demands (R. 67 & 69). On the other hand, each appellant urges that an act which does not afford him an opportunity to demonstrate that any past membership in any of the proscribed organizations did not bespeak disloyalty to the State or to the Nation, does not give the requirement a reasonable relation to the purpose of the Act, and for that reason offends due process.

The proscribed organization may have been loyal at the time one's affiliation occurred, and later became subversive. One's past affiliation may have occurred in ignorance of an organization's subversive purpose, or one, innocent of a subversive organizational purpose at

the time his affiliation occurred, may have later severed membership when he learned of the organizational disloyalty. Additionally the United States Attorney General's finding of subversiveness may have been made without notice and hearing, or after notice and hearing but without any evidence to support his finding. While a particular person may not be able to rebut the presumptions of disloyalty by establishing any of the fact alternatives suggested above, it is the denial of the opportunity to do so after notice and hearing that makes the Oath requirement stand without reasonable relation to the statutory purpose.

The notice and hearing common to the Anglo-American judicial trial, affording an opportunity to rebut the presumption of the guilt by association, constitutes the very basis of fairness and reasonableness.

> "A person's right to a reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; * * *"
>
> *In re: Oliver*, 333 U.S. 257, 273.

When presumptions are raised and obligations are imposed because of one's relationship to an organization, he is entitled to an opportunity to rebut them. *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424. Arbitrary determinations, that is, determinations made contrary to fact, even when made after notice and hearing cannot stand.

Joint Anti-Facist Refugee Committee v. *McGrath*, 341 U.S. 123, 137-139.

The Feinberg Law was sustained by this Court in *Adler et al.* v. *Board of Education of the City of New York*, 72 S. Ct. 380 (not yet officially reported), because, among other things, it afforded to teachers in the public school system of the State of New York the notice and hearing that was not provided by the Oklahoma Act. While the Oklahoma Supreme Court in the instant case held that the appellants' employment continues only upon terms satisfactory to the State (Board of Regents), this Court held in the *Adler case* that:

> "It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York." 72 S. Ct. 380, 384.

Again, in the *Adler case*, this Court, while sustaining as due process the evidentiary effect that disloyalty may be presumed from past membership in a particular organization, sustained the Feinberg Law only because the presumption therein was not made conclusive. In that connection this Court said:

> "The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it." 72 S. Ct. 380, 386.

After quoting the Court of Appeals of the State of New York concerning the meaning and effect of *prima facie* presumptions, this Court concluded:

> "Where, as here, the relation between the fact found and the presumption is clear and direct and *is not conclusive*, the requirements of due process are satisfied." 72 S. Ct. 380, 386. (Emphasis supplied.)

Relevant to this point is the Oklahoma Supreme Court's appraisal of the statutory purpose:

> "The real purpose of the Legislature was to make loyalty a qualification to hold public office or be employed by the State." 237 P. 2d 131, 136.

In doing what the Oklahoma Supreme Court said the Oklahoma Legislature did—that is, making past membership in certain groups a conclusive presumption of disloyalty, the State of Oklahoma thereby devised a test which did not bear a reasonable relation to the purpose of the Act.

In *Western & A.R.R.* v. *Henderson*, 279 U.S. 639, a Georgia statute, held offensive to due process under the Fourteenth Amendment, provided:

> "A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.'" 279 U.S. 639, 640.

This Court reversed a judgment for damages under this statute recovered by the wife for the death of her husband, killed at a grade crossing of a public highway and appellant's railroad, in a collision between a motor truck that the husband was driving and one of appellant's trains. The Court held:

> "A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." 279 U.S. 639, 642.

Additionally, the Act as construed by the Oklahoma Supreme Court permits membership in subversive organizations free from any presumption of disqualifying disloyalty *if found to be subversive* by the Attorney General *after* the passage of the Act. This absence of a reasonable relationship between the requirements of the Oath and the statutory purpose is accentuated by the fact that both past and present memberships, as of the time a person takes the Oath, in organizations found to be subversive after the passage of the Act, raises no presumption of disloyalty, either *prima facie* or conclusive.

But each appellant could not know what organizations had been proscribed by the Attorney General, either within the five years immediately preceding the taking of the Oath, or at any time prior to the effective date of the Act. Certainly each appellant as of the time he was

required to take the Oath could reasonably assume that the Act embraced determinations made within five years immediately preceding the taking of the Oath. This construction required each appellant to be informed right up to the time he was taking the Oath what determinations had been made. Under the circumstances it was impossible for appellants to know this. Under the pertinent Executive Order, the list of organizations proscribed by the United States Attorney General is not published by the Attorney General. The Executive Order, No. 9835, Part III, Sec. 3 (12 Fed. Reg. 1935, 1938), requires that the list be currently furnished by the Attorney General to the Loyalty Review Board. This list may be, and has been, very large. This Board may hold the list for days before making it public. A list, containing 95 organizations, furnished by the Attorney General, November 24, 1947, was not disseminated until March 20, 1948 (13 Fed. Reg. 1473). The consolidated list, supplied October 30, 1950, contained 211 organizations (15 Fed. Reg. 8145) and was not disseminated until November 29, 1950. Moreover, no publicity designed to give knowledge to the general public is contemplated by the Act. Neither does the Oklahoma Act charge any State official to acquire and have available such information for the benefit of one required to take the Oath (See Part III, Sec. 3 of Executive Order

No. 9385 set forth in *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123, 125).

It is not consonant with due process for men to be asked, on the pain of forfeiture of contracts and a denial of compensation thereunder, to swear to something that they cannot be expected to know. Such a declaration under oath can be nothing more than a belief; probably nothing more than a guess. To require one to swear to his beliefs under such circumstances denies due process.

It is no answer to say that the Supreme Court of Oklahoma construed the words "that within five (5) years immediately *preceding the taking of this oath* * * * I have not been a member of * * * any group whatever which has been officially determined by the United States Attorney General * * *," to mean those groups officially determined *prior to the effective date of the Act.* The State Supreme Court in referring to this language said:

> "It has no reference to organizations that may have been added by the Attorney General after the passage of the Act, and up to the time of taking the oath." (R. 63 & 64).

To say the least, such an interpretation is not one to be anticipated by one required to take an oath declaratory of the fact "within five years immediately preceding the taking of this oath."

Certainly the ordinary connotation of this language means that the period within which the Attorney General would have made his interpretation extended right up to the time the Oath is taken.

Even upon the assumption that appellants could have guessed that the Act only embraced determinations made prior to the effective date of the Act, appellants were not in a position to know or be informed of such determinations. They were required to take the Oath within thirty days from the effective date of the Act. Within that time the Attorney General could have made determinations not published until much later by the Loyalty Review Board, and then published only for use by Federal agencies.

The denial of liberty and property occurs because each appellant is denied the opportunity to perform a valid contract of employment and to enjoy the benefits of such performance. Freedom of contract has long been recognized as one of the liberties, and its fruits a specie of property, protected by the Constitution of the United States.

> "That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly, or arbitrarily interfered with, consistently with the due process of law guaranteed by the 14th Amendment, we are not disposed to question. This court has affirmed the principle in recent cases. Adair v. United States, 208 U.S. 161, 174, 52 L. Ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Coppage v. Kansas, 236 U.S. 1, 14, 50 L. Ed. 441, 446, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240."

Prudential Life Ins. Co. v. Cheek, 259 U.S. 530, 536.

Certainly the freedom to contract as a liberty protected by the Fourteenth Amendment against arbitrary action embraces the liberty to perform the contract according to its terms and to enjoy the fruits of such performance.

The purpose of the Act is to make political loyalty a qualification for holding public office or public employment in the State of Oklahoma. The test of disloyalty under the Act is one's failure to take an oath which creates a conclusive presumption of disloyalty due to past affiliations. The requirements of such an oath, which create a conclusive presumption of disloyalty by reason of past membership in an organization of a class only vaguely determinable by the jurator, does not bear a reasonable relation to the purpose of the Act.

POINT III

The Act, as applied to appellants, Lee, Correll, Baum, Schmoe and Nietz, each of whom sincerely believes that bearing arms against one's fellow man is contrary to divine law, by requiring each of them to promise under oath to bear arms, denies each named appellant his liberty without due process of law, contrary to the Fourteenth Amendment; because as to the named appellants, the Act is a law respecting the free exercise of religion.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold said statute violated the constitutional rights of appellants, Lee, Correll, Nietz, Schmoe and Baum, each holding sincere religious conviction opposing the bearing of arms against his fellow man, which statute prohibited payment of accrued salaries to each of said appellants, due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each of said appellants to subscribe and file the Oath with designated authorities required by said statute, which Oath, among other things, is to the effect that each of said appellants swear that he will take up arms in defense of the United States in time of war or national emergency, if necessary, in that the operation and effect of said statute, as set forth above, constitutes a law respecting the free exercise of religion, contrary to the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law.

ARGUMENT

This point is urged by five of the seven appellants, namely: Lee, Correll, Baum, Schmoe and Nietz.

When appellants, prior to the passage of the Act (R. 25 & 42) contracted with the Board of Regents to render service to Oklahoma Agricultural and Mechanical College, no oath was required that the contracting parties take up arms in defense of the United States in time of war or national emergency, if necessary—in fact, no oath of any kind was required. Appellants, Lee, Correll,

Baum, Schmoe and Nietz (the two latter are women) alleged in their verified Consolidated Petition in Intervention, and in their cross-action (R. 30-31 & 32) that each "conscientiously and sincerely believes that war and the use of force between Nations is contrary to the Will of God and is forbidden by divine law, and that in obedience to these principles and as a matter of religious faith and obligation * * * cannot and will not, because of his aforesaid religious convictions, bear arms against his fellowman." These declarations made under oath were received in evidence as proof of the facts (R. 41) by oral stipulation of the parties and by order of the court (R. 41). They were also covered by the written stipulation of the parties (R. 43). The court found the facts to be as the parties had stipulated (R. 52).

It is the position of the named appellants, that is, all appellants, except Ziebur and Wieman, that the belief that it is against the Will of God for one to bear arms against his fellowman, is a religious belief and that the practice of abstinence from bearing arms against one's fellowman, pursuant to such belief, is the exercise of a religion. Additionally, appellants say that to require one who practices abstinence to swear that he will bear arms in the defense of the United States in time of war or national emergency, if necessary, is an interference with the free exercise of appellants' religion (the Supreme Court of Oklahoma construed the words "if necessary"

to mean if the Congress makes such requirement by valid law (R. 68)]. The interference with appellants' religious practice of abstinence is direct and coercive here, because under the Oklahoma Act requiring the Oath, appellants suffer forfeiture of their contracts of employment and a denial of compensation due thereunder, if each appellant does not take an oath to bear arms—that is, take an oath to do the thing he conscientiously and sincerely believes that his God forbids.

To prohibit the free exercise of a religion is a denial of liberty without due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. "The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. * * * Thus the Amendment embraces two concepts — freedom to believe and freedom to act." *Cantwell et al.* v. *State of Connecticut*, 310 U.S. 296, 303. The *Cantwell case* involved the exercise of a religion by affirmative acts—the distribution of religious periodicals and the oral exposition of ideas by phonograph records. Other decisions by this Court prohibiting State interference perforce the Fourteenth Amendment, with affirmative acts constituting the free exercise of religion are *Neimotko* v. *State of Maryland*, 340 U.S. 268; *Taylor* v. *State of Mississippi*, 319 U.S. 583; *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105. A State cannot force a person to express

a disbelief in any religion. *People of State of Illinois ex rel. McCullom* v. *Board of Education*, 333 U.S. 203. But, here non-resistance—mere inaction—is the religious practice for which the appellants (except Ziebur and Wieman) seek protection. "Thou shalt not kill," to them, is an unqualified mandate of divine law. Moreover one need only remember that non-resistance was one of the pillars of the religious doctrine expounded by Jesus of Nazareth to know that abstinence from bearing arms against one's fellowman is a religious practice. In expounding the philosophy of religious liberty inherent in the Fourteenth Amendment, Mr. Justice Roberts, speaking for the Court in the *Cantwell case*, said:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in

> the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish." 310 U.S. 296, 310.

More closely akin to the case at Bar is the insistence upon the right to abstain from the flag salute involved in *West Virginia State Board of Education et al.* v. *Barnette et al.*, 319 U.S. 624. In this case the children of parents belonging to a sect known as "Jehovah's Witnesses" were expelled from school because, upon the religious ground hereinafter stated, they refused to salute the American flag while repeating "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all." Refusal to salute was based upon the religious belief that the flag salute violated that part of the First Commandment which, among other things, says, "Thou shalt not make unto thee any graven image * * *." The parents who advised their children not to give the salute and repeat the pledge were prosecuted and threatened with prosecution for causing delinquency. The children were either expelled or threatened with expulsion. In affirming a judgment of the United States District Court for the District of West Virginia, enjoining the enforcement of the regulations requiring the salute and the pledge, this Court said:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. *Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.* The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." 319 U.S. 624, 638-9. (Emphasis supplied.)

It is only to prevent grave and immediate danger to interests which the state may lawfully protect that justifies State action designed to interfere with the free exer-

cise of a religion. But, the Supreme Court of Oklahoma said, in appraising the nature and purpose of the Oklahoma Act,

> "The real purpose of the Legislature was to make loyalty a qualification to hold public office or to be employed by the State." 237 P. 2d 131, 136,

and further that,

> "The Legislature had the power and the duty to prescribe qualifications for teachers in our public institutions. The loyalty oath required as a prerequisite to payment for teaching in our public institutions cannot be said, as a matter of law, to be unreasonable, arbitrary and capricious, or to violate any constitutional rights guaranteed by either the State or Federal Constitution. All parts of the loyalty oath required appear to be reasonable related to the purposes of the Act." 237 P. 2d 131, 138.

But, the Supreme Court of Oklahoma, in so doing, does not point to any clear and present danger which justifies the invasion of the religious liberty of appellants or to any express or implied legislative finding to that effect. No act of appellants is pointed to, neither does any implied finding of the Legislature warrant any conclusion that the teachers in universities and colleges, and other public institutions in Oklahoma, have attempted to teach their religion in the performance of their teaching services or have attempted to do anything that precipitates a clear and present danger to the State or to the Nation. On the other hand, the trial court has found as a fact that the appellants have conformed to the requirements of their contract in every respect.

In *Dennis* v. *United States*, 341 U.S. 494, the Supreme Court of the United States, in restating the "clear and present danger" concept as a justification for invading or limiting rights guaranteed by the First Amendment, adopted the test laid down by Judge Learned Hand as follows:

> " 'In each case [courts] must ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " 341 U.S. 494, 510.

Under that test nothing appears in this record to afford any justification for the State of Oklahoma to forfeit contracts and deny compensation earned thereunder, merely because a teacher in a State university or college refuses to take an oath to bear arms against a fellowman when he sincerely believes such an oath and the practice contemplated thereby, would be a disobedience to God, and an infraction of the Word of God. The Act in this respect is, contrary to the judgment of the Supreme Court in the State of Oklahoma, unreasonable, arbitrary and capricious.

In *West Virginia State Board of Education et al.* v. *Barnette et al.*, 319 U.S. 624, this Court, in expounding "clear and present danger" that must exist to justify coercion of flag salute in violation of the freedoms of the First Amendment, said:

> "It would seem that involuntary affirmation could be commanded only on even more immediate

> and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." 319 U.S. 624, 633-634.

As indicated, the Supreme Court of Oklahoma apparently gave no consideration to the "clear and present danger" concept, and apparently concluded that while freedom to believe is protected by the First Amendment, freedom of action has no more protection than any other kind of human conduct, whether within or without the contemplation of the First Amendment.

Finally it should be observed that the Congress, that has supreme authority and responsibility in providing armed security for the Nation, has sensed no clear and present danger originating with persons believing it is against the Will of God to bear arms. As urged under Point IV of this Brief, the Congress itself has exempted persons in the class of appellants from military service. Rather than requiring an oath to bear arms, the Congress has enacted laws in obviation of such a requirement.

In *Girouard* v. *United States*, 328 U.S. 61, this Court gave cogent expression to the historical reason for the traditional policy of the Congress in respecting the free exercise of religion. In this case a construction

of the laws pertaining to naturalization was involved. The particular point was whether one otherwise entitled to become naturalized could be denied the privilege because he answered "no" to the question, "If necessary are you willing to take up arms in defense of this country?" This Court held that in the light of the traditional policy of the Congress to respect the free exercise of religion, nothing in the naturalization laws could be construed to require an affirmative answer to this question. What this Court said in the *Girouard case* has apt application here in determining whether the State of Oklahoma had on this record a constitutional basis, under the clear and present danger rule, for denying these appellants the exercise of their religion.

> "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. * * * Over the years Congress has meticulously respected that tradition and even in time of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied. * * * Cogent evidence would be necessary to convince us

that Congress took that course." 328 U.S. 61, 68, 69.

POINT IV

The Act perforce the requirements of the Oath as applied to Lee, Correll, Baum, Schmoe and Nietz, in requiring each of them to take an oath to bear arms, when each holds sincere religious convictions contrary thereto, constitutes an unconstitutional interference with the exclusive powers of the Congress to raise and support armies and provide and maintain a navy, under Article 1, Section 8 of the Constitution of the United States, when antecedently to the passage of the Act, the Congress, by law, had exempted such persons from the duty to bear arms.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute which, among other things, required that each appellant swear that he "will take up arms in defense of the United States in time of War or National Emergency, if necessary," ("if necessary" was construed by said court to mean "if by valid law required"), in that the operation and effect of said statute as set forth above violates Article 1, Section 8 of the Constitution of the United States, delegating exclusively to the Congress the power to raise and support armies and provide and maintain the navy, by interfering

with the enforcement of a complete, comprehensive and fully integrated scheme enacted by the Congress as the Selective Service Act of 1948, and in effect at the time of the enactment of said statute.

ARGUMENT

This point is urged by five of the seven appellants, namely, Lee, Correll, Baum, Schmoe and Nietz.

When these appellants, prior to the passage of the Act (R. 25 & 42), contracted with the Board of Regents to render service to Oklahoma Agricultural and Mechanical College, no oath was required that the contracting parties would take up arms in defense of the United States in time of war or national emergency, if necessary —in fact, no oath of any kind was required. Appellants, Lee, Correll, Baum, Schmoe and Nietz (the two latter are women) alleged in their verified Consolidated Petition in Intervention, and in their cross-action (R. 30-31 & 32) that each "conscientiously and sincerely believes that war and the use of force between nations is contrary to the Will of God and is forbidden by divine law, and that in obedience to these principles and as a matter of religious faith and obligation * * * cannot and will not, because of his aforesaid religious convictions, bear arms against his fellowman." These declarations made under oath were received in evidence as proof of the facts (R. 41), by oral stipulation of the parties and by order of the court (R. 41). They were also

covered by the written stipulation of the parties (R. 43). The court found the facts to be as the parties had stipulated (R. 52).

Appellants asserted at every stage of this case that the requirement of the Oath constituted an unconstitutional interference with the power of the Congress under Article 1, Section 8 of the Constitution of the United States, to raise and support armies and provide for and maintain a navy (R. 4, 15, 28, 29, 46, 83).

The interference is direct and obvious in view of the fact that the Congress, in the exercise of such constitutional powers, has enacted a complete, comprehensive and fully integrated scheme embracing all conditions under which military service is to be rendered to the United States, and in this connection has exempted persons in the class of appellants from bearing arms. The Selective Service Act of 1948 provides [62 Stat. 609 (j)]:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who by reason of religious training and belief is conscientiously opposed to participation in war in any form."

The Universal Military Training and Service Act of 1951 provides:

> "Nothing contained in this title (Sections 451-454 and 455-471 of this Appendix) shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious train-

> ing and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an indivdual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * *" 50 U.S.C.A., App. Sec. 456(j).

Each of appellants come squarely under the exemption of the Selective Service Act of 1948 and the Universal Training and Service Act enacted in 1951. Moreover, Section 456j in each Act set forth following the declaration of exemptions is a procedural scheme under which conscientious objectors may be granted exemptions from combatant service and even non-combatant service.

Certainly the Congress in the enactment of this constitutional power was faced with the responsibility of accommodating its purposes to the seriously held religious viewpoints of persons entitled to constitutional protection. Of necessity the Congress attempted to enact legislation in the exercise of its war powers that would have the greatest possible support from all people of differing religious and political beliefs. Attempting to accomplish this purpose and in connection therewith to elicit the greatest possible support for its military policy from religious groups, the Congress adopted the policy of exemption to persons holding the indicated religious views, to be administered under a carefully devised procedure. After such a law is enacted by the Congress, definite interference ending in substantial frustration oc-

curs when the State of Oklahoma, in the face of congressional policy, harasses American citizens by requiring them to take an oath to do the very thing that the Congress has decided to exempt them from doing in developing by legislative enactment a uniform military policy. And it should be observed in this connection that the prosecution of modern warfare requires uniformity of treatment on a large scale that brooks no interference from one or more of the States of the Union.

To permit the Oklahoma Act to stand is surely contrary to Article 6 of Section 1 of the Constitution of the United States, providing that the Constitution and Laws of the United States made in pursuance thereof, shall be the supreme law of the land.

The Congress, vitally concerned with total public support for its military aims, decided that it should not coerce entry into the military service of the United States by persons like the named appellants who, in obedience to divine law, cannot take an oath to bear arms against their fellowman.

The fact that the Supreme Court of Oklahoma has given the "bear arms" provision of the Oath a meaning somewhat more clear than the statutory connotation does not lessen to any extent the character of interference with congressional policy that results from the compulsions of the Oath required by the Oklahoma Act. The ambiguity of the statutory language merely magnified the harassing effect of the Act.

The Oklahoma Supreme Court said the words "if necessary" meant that the jurating person only promised to bear arms if the Congress decided it was necessary. But this does not alleviate the harassment of persons in the class of appellants that the Congress was attempting to consider and protect. Compelling such persons to face the acute constitutional issue presented by the Oklahoma Act, constitutes an interference with congressional policy that at least for the present by-passes the constitutional issue by granting the exemption.

The position of appellants on this point is valid under the doctrine announced in *Hines, Secretary of Labor and Industry of Pennsylvania et al.* v. *Davidowitz et al.*, 312 U.S. 52. The following statement of facts is taken from the opinion:

> "This case involves the validity of an Alien Registration Act adopted by the Commonwealth of Pennsylvania. The Act, passed in 1939, requires every alien 18 years or over, with certain exceptions, to register once each year; provide such information as is required by the statute, plus any 'other information and details' that the Department of Labor and Industry may direct; pay $1 as an annual registration fee; receive an alien identification card and carry it at all times; show the card whenever it may be demanded by any police officer or any agent of the Department of Labor and Industry; and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one. The Department of Labor and Industry is charged with the duties of classifying the registrations for 'the purpose of ready reference,' and furnishing a copy of the classification to the Pennsyl-

vania Motor Police. Non-exempt aliens who fail to register are subject to a fine of not more than $100 or imprisonment for not more than 60 days, or both. For failure to carry an identification card or for failure to show it upon proper demand, the punishment is a fine of not more than $10, or imprisonment for not more than 10 days, or both." 312 U.S. 52, 59.

After reviewing the complete and comprehensive treatment of alien registration that had been enacted by the Congress, the Supreme Court of the United States, Mr. Justice Black speaking, said:

"Having the constitutional authority so to do, [the Congress] has provided a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens. When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might also generate the very disloyalty which the law has intended guarding against. Under these circumstances, the Pennsylvania Act cannot be enforced." 312 U.S. 52, 74.

That the Oklahoma Legislature, in requiring the Oath, was dealing with a different field of State policy —namely, qualifications for State office—than the field of national policy embracing military service, does not and cannot belie the direct interference with congressional purpose, resulting from enforcement of the Oklahoma Act. That direct interference occurs is the important

consideration. In *Hines* v. *Davidowitz, supra,* the Court said:

> "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every Act of Congress. This Court, in considering the validity of State laws in the light of treaties or Federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. 52, 67.

That the Oklahoma Act stands as an obstacle to congressional purpose, there can be no doubt. That the Oklahoma law entrenches upon freedom of religious practice accentuates the interference.

> "And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from State tax statutes or State pure food laws regulating the label on cans."
>
> *Hines* v. *Davidowitz,* 312 U.S. 52, 68.

Upon the enactment by the Congress of the Selective Service Act of 1948, the named appellants should be able to feel that implicit in Section 456j was a uniform na-

tional policy which could not be threatened by State action and that would prevent harassment through State legislation inconsistent therewith. The Supreme Court of the State of Wisconsin, in striking down as unconstitutional, attempted interference by the State of Wisconsin with the miltary policy of the Congress, held that a statute of Wisconsin granting a more liberal exemption from service of judicial process during military service than that granted by the Congress under the Soldiers' and Sailors' Civil Relief Act interfered unconstitutionally with the war powers of the Congress. *Konkel* v. *State of Wisconsin*, 170 N.W. 715. In the *Konkel case* the Supreme Court of Wisconsin said:

> "There is another principle applicable to the situation under consideration here, and that is that the regulation in respect to the service of civil process upon persons in the military service of the United States is of a purely national character. * * * The orderly administration of the affairs of the army and navy require that such regulations should be uniform. The military and administrative officers of the United States ought not to be required to look into the statute books of 48 separate States to determine what the privileges and immunities of United States soldiers are. Congress having, in the exercise of its constitutional powers, provided for the exemption of persons in the military service of the United States from process of civil courts of Wisconsin, it supersedes any like provision made by the State." 170 N.W. 715, 718.

POINT V

The Act perforce the requirements of the Oath denied appellants liberty without due process of law, in violation of the Fourteenth Amendment, by forfeiting contracts of employment and by denying payment of accrued compensation thereunder, because appellants failed to take the Oath when such failure was due to a serious and reasonable doubt as to its meaning.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that said statute violated the constitutional rights of each appellant, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appellant to subscribe and file with designated authorities the Oath required by said statute, which Oath is so vague that men of common intelligence must guess at its meaning and differ as to its application, thus rendering the operation and effect of said statute as set forth above a deprivation of liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law. The respects in which the Oath is vague appear, by virtue of the construction of the language of the Oath by the Supreme Court of Oklahoma in its said judgment and decision, as follows:

> **(a) By construing that "I am not affiliated directly or indirectly with * * * any foreign political agency, party, organization or government" as meaning any foreign political agency, party,**

organization or government officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization.

(b) By construing the language of the Oath, "that I am not affiliated directly or indirectly with" to mean "that I am not affiliated directly or indirectly with at the time of the passage of the Act."

(c) By construing the language of the Oath, "that within five (5) years immediately preceding the taking of the Oath I have not been a member," to mean within the five years immediately preceding the passage of the Act, without regard to when the Oath is taken.

(d) By construing the language of the Oath, "that I will take up arms in defense of the United States in time of War or National Emergency if necessary," to mean, in respect of the words "if necessary," "if by valid law required."

ARGUMENT

In stressing the problems presented to appellants by the ambiguities and vagueness of the Oath under this Point V, reference is first made to the basic infringements of appellants' constitutional rights under Points I (attainder), II (unreasonable relation), III (denial of religious liberty) and VI (impairment of contract obligation) and that the infringements become more acute when considered in connection with such ambiguities.

A jurator in the position of each appellant, faced with losing compensation for his services and a forfeiture

of his contract of employment for failure to take the Oath, is confronted with an oppressive dilemma when he cannot know the meaning of the facts implicit in the Oath he is required to take, either because the information is not or cannot be made available to him, or because he cannot with any certainty know the meaning of what he is uttering.

For example, each appellant was required to swear "that I am not affiliated directly or indirectly * * * with any foreign political agency, party, organization or government, or with any agency, party, organization, association or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization * * *."

In deciding what this meant, each appellant faced the fact that many organizations, not ordinarily taboo, are administered at times, and sometimes always, from a foreign office and a foreign seat of government. Among such organizations are the International Bar Association, the Canadian Bar Association, the British Bar Association, the Rotary Club, the Lions Club, scientific societies, church organizations, religious institutions, and the like. If the language of the Oath embraced such organizations he could not take it. He could not safely assume that only foreign organizations proscribed by the Attorney General were taboo. Moreover, to be in the proscribed

class, it was only necessary that he be "affiliated directly or indirectly."

In an apparent effort to obviate this dilemma, the Supreme Court of Oklahoma construed this language to refer only to foreign organizations or governments which had been officially determined to be communist front or subversive. But as to this, had the jurator had the time to investigate, he would have found that the Attorney General had never included foreign governments on his lists.

Additionally it is the position of each appellant that at the time he was required to take the Oath he had no way of knowing or surmising the meaning the Supreme Court of Oklahoma actually gave to the Act in reference to determinations made within a certain prior five-year period by the Attorney General of the United States, that particular groups are either communist front or subversive. In fact, not only is the Act in question vague and indefinite, but what the Supreme Court of Oklahoma said it meant in this reference is vague and indefinite. The Oklahoma Supreme Court construed the words of the Oath "that I am not affiliated directly or indirectly * * * with any * * * group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization" to refer "to a list or lists of such organizations

in evidence at the time of the passage of the Act which had been prepared by the Attorney General under governmental directive," and held that the Oath did not embrace membership in groups determined to be communist front or subversive prior to the taking of the Oath and after the passage of the Act (R. 63).

In reference to past membership in organizations, the State Supreme Court also held:

> "That part of the oath that says 'that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, * * *' refers to the same organizations listed by the Attorney General and in existence at the time of the passage of the Act. It has no reference to organizations that may have been added by the Attorney General after the passage of the Act and up to the time of the taking of the oath. The oath under this phrase is to the effect that affiant has not been a member of any of the organizations so listed by the Attorney General within the five year period previous to the taking of the oath." (R. 63-64).

In view of the last sentence of this quotation, it is not clear whether the jurator is required to swear that within five years *prior to the taking of the oath* he was not a member in any organization proscribed by the Attorney General for all time prior to the effective date of the Act, or whether he had not been a member within five years *prior to the effective date of the Act* in any organization proscribed by the Attorney General for all time prior to the effective date of the Act. It is at least obvious in the light of this interpretation that this language as used by

the Legislature was vague and indefinite, considered without regard to the State court's construction, or considered as words designed to express the meaning discovered by the Supreme Court of Oklahoma.

To make the same point differently, it may be said that one of common intelligence, required to take the Oath before the opinion was written, could hardly anticipate the ruling of the court, or might have anticipated that the court's ruling could have been either — all of which leaves the jurator in a considerable dilemma when faced with a forfeiture of his contract and denial of compensation for his failure to guess what the Supreme Court of Oklahoma would ultimately say that the Legislature meant. It placed the jurator in the position of not being able to determine whether the Legislature meant a determination made prior to the taking of the Oath, or made prior to the effective date of the Act. If made prior to the taking of the Oath, the jurator could not know what determinations were made because of the procedural course which the Executive Order of the President required the Attorney General to follow.

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 125, and Footnotes 3, 4 and 5.

When language is vague, and if vague, the degree of vagueness, or when a discovered meaning of words could not be anticipated, is largely a matter of intuitive

judgment grounded in one's experience and in his acquaintance with the mother tongue and its application.

In the light of the cases hereinafter cited, it is believed that this Court cannot escape the judgment that the language used is unconstitutionally vague in the light of the State court's construction, or that the meaning given the words could not be anticipated or should not be required to be anticipated by a jurator required to take the Oath before the Act has been judicially construed.

As indicated above appellants urge this same point in respect of the language of the Oath, "that I am not affiliated directly or indirectly * * * with any foreign political agency, party, organization or government * * *." The jurator could not know, due to the punctuation of the Oath as it appeared in the Act, whether this meant *any* foreign group or only a foreign group which had been proscribed by the Attorney General. Appellants also make the same point of vagueness in reference to that part of the Oath requiring, "that I will take up arms in the defense of the United States in time of War or National Emergency, if necessary." The Supreme Court of Oklahoma said that the words "if necessary" meant if by valid law required (R. 68).

Due to vagueness, the challenged parts of the Oath fall under the application of the rule in *Connally* v. *General Construction Co.*, 269 U.S. 385. In the *Con-*

nally case an Oklahoma statute required construction companies, engaged in construction work for the State of Oklahoma, to pay wages to certain classes of employees that equalled the prevailing or average wage in the community where the work was being done. This statute was held void for indefiniteness. In referring to the lack of definite meaning of the words "prevailing or average wage in the community," the Court said:

> "* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." 269 U.S. 385, 391.

In connection with all ambiguities of the Oath, the following bears repetition: the jurator could well assume that the Oath embraced organizations proscribed by the Attorney General up to the time the Oath was taken. The court below said the language of the Oath embraced organizations proscribed up to the time of the Act was passed and not after the Act was passed. In either event it was impossible for the appellants to know what determinations had been made. Under the pertinent Executive Order, the Attorney General's list of proscribed organizations was not published by the Attorney General. The Executive Order, No. 9835, Part III, Sec. 3 (12 Fed. Reg. 1935-1938), requires only that the list be currently furnished by the Attorney General to the Loyalty Review Board, which may pub-

lish it later. This list may be withheld several weeks before publication.

Additionally, under the lower court's construction, the jurator had to ascertain for himself the name of every organization proscribed for all time prior to the effective date of the Act. The jurator could not, without grave doubt as to the meaning of the Oath he was uttering, take it until after he had employed counsel to make prolonged search in the books in order that the identity and integrity of any particular list, imputed to the Attorney General, be determined.

POINT VI

The Act perforce the requirements of the Oath impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, in that the statutory forfeiture of said contract and the denial of the accrued compensation thereunder is effected by an unreasonable exercise of the reserved protective power of the State.

SPECIFICATION OF ERROR

The Supreme Court of the State of Oklahoma erred in failing to hold that a statute of the State of Oklahoma, namely, Enrolled House Bill No. 8, 23rd Legislature [Laws 1951; 51 O.S. 1941 (Supp.) 37.1-37.8], violated the constitutional rights of each of the appellants, which statute prohibited payment of accrued salaries to each appellant due under a valid contract of employment entered into prior to the enactment of said statute, and forfeited said contract of employment without judicial trial for failure of each appel-

lant to subscribe and file with designated authorities the Oath required by said statute, which Oath, among other things, is to the effect that each appellant swear that at any time within five years immediately preceding the enactment of said statute he had not been a member of any agency, party, organization, association or group whatever which had been officially determined, prior to the enactment of said statute, by the United States Attorney General or other authorized agency to be a communist front or subversive organization, in that the operation and effect of said statute as set forth above impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts.

ARGUMENT

1. The contract of each appellant, not requiring any oath, was executed prior to the passage of the Act requiring the Oath.

Each appellant, a citizen of the United States and of the State of Oklahoma had a valid contract of employment for a fixed compensation with the Board of Regents, ratified by the Board (R. 43) upon the recommendation of the President of the College (R. 43) entered into prior to the effective date of the Act, and extending at least until the end of the then current fiscal year (June 30, 1951) (R. 25). Appellant Wieman was Assistant Professor of Philosophy with tenure until September 1, 1951, at an annual salary of $3600.00 (R. 25). Appellant Lee was Associate Professor of Chemis-

try with tenure until December 1, 1954, at an annual salary of $4200.00 (R. 25). Appellant Baum was Assistant Professor of Botany with tenure until September 1, 1951, at an annual salary of $3600.00 (R. 25). Appellant Correll was Professor of Physics and Chairman of Physical Science with permanent tenure, at an annual salary of $6000.00 (R. 25). Appellant Nietz was Assistant Professor of Music with tenure until September 1, 1951, at an annual salary of $3000.00 (R. 25). Appellant Schmoe was a Secretary appointed February 1, 1951, whose contract extended until the end of the then current fiscal year, at an annual salary of $1,610.00 (R. 25). Appellant Ziebur was Research Assistant in the Research Foundation, appointed September 1, 1950, whose contract extended to the end of the then current fiscal year, at an annual salary of $900.00 (R. 25).

Each appellant complied in every respect with his contract of employment (R. 43). Each appellant was ready, able and willing to continue his employment and to continue to render service pursuant to the terms of his contract (R. 43). After the effective date of the Act, April 9, 1951, each appellant, with the consent of appellee, Board of Regents, continued to perform services under his contract until the judgment of the trial court on May 21, 1951, terminated the contract of each appellant, and enjoined the payment of his compensation

thereunder (R. 43). Funds are lawfully available to meet the salary obligation of the contract of each appellant (R. 43).

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2. The obligation of the contract of each appellant was impaired as a matter of fact.

Section 1 of the Act (this Brief, Page 3) provides that any employee who fails to take and subscribe to the Oath within the time required (30 days from April 9, 1951) forfeits his employment. Section 3 of the Act (this Brief, Page 6) provides that no compensation shall be paid to any employee unless he has taken and subscribed to the Oath. The trial court in its judgment entered pursuant to the Act, denied each appellant compensation and forfeited his contract of employment.

> "The court concludes that the intervenors [appellants], and each of them, did not take and subscribe to the oath as provided in Section 2 of the Act and wilfully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered." (R. 54, 6th).

The trial court accordingly denied each appellant mandatory injunctive relief requiring the State Treasurer, the State Auditor and the Board of Regents to pay compensation due each appellant under his contract, and enjoined the Board of Regents, the State Treasurer and the State Auditor from making payment (R. 57). This Act was affirmed by the Supreme Court of the State of Oklahoma (R. 69).

In defining the scope of its review, the Supreme Court of Oklahoma declared:

> "Only those propositions asserted which are essential to determine whether or not the trial court erred in refusing injunctive relief to intervenors [appelants] will be discussed." (R. 61).

The judgment of the Supreme Court of Oklahoma was:

> "The judgment denying injunctive relief to intervenors [appellants] on their cross-petitions is affirmed." (R. 69).

---

3. The contract of each appellant is protected by Article 1, Section 10 of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts.

Contracts with an agency of the State, especially when they constitute an obligation to pay money, enjoy the protection of Article 1, Section 10 of the Federal Constitution, prohibting the passing of any law impairing the obligation of contracts. This prohibition applies to such contracts the same as it applies to contracts between two private persons. When a State obligates itself to pay money for services performed, under stipulated conditions, it assumes, in a constitutional sense, the character of a private person.

Hall v. *State of Wisconsin*,
103 U.S. 302.

In the *Hall case*, after Hall had been employed by the State of Wisconsin to make a geological survey under the authority of an act authorizing a contract for such

purpose, and after performance had commenced, the State Legislature repealed the act. After the repeal, Hall was refused compensation and brought this action to recover it.

In holding that the repeal statute impaired the obligation of contracts, the Supreme Court of the United States, citing a Wisconsin case closely applicable here, said:

> "In *Butler* v. *Regents of Univer.*, 32 Wis. 124, the same court held, without dissent, that a professor in the State University, appointed for a stated term with a fixed salary, was not a *public officer* in such a sense as prevented his employment from creating a contract relation between himself and the Regents." 103 U.S. 302, 305.

The Court reached its ultimate conclusion with these words, quoting Mr. Justice Story in *Dartmouth College* v. *Woodward*, 4 Wheat. 694:

> "'* * * But when the Legislature *makes a contract* with a public officer, as in a case of a *stipulated salary* for his services *during a limited period*, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens.'" 103 U.S. 302. 305.

And speaking itself:

> "When a State descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly." 103 U.S. 302, 305.

In *State of Mississippi, for Use of Robertson* v. *Miller et al.*, 176 U.S. 174, it was held that the contract

impairment clause applied to a public officer who was denied compensation due for services performed.

In *State of Indiana ex rel, Anderson* v. *Brand*, 303 U.S. 95, the Supreme Court of the United States sustained the validity of an Indiana tenure statute and, treating it as a part of the teacher's contract of employment, held that its repeal violated the provision of the Federal Constitution prohibiting a State from passing any law impairing the obligation of contracts.

Although in the *Brand case* the judgment of the Supreme Court of Indiana was reversed to give the State court the opportunity to pass upon a demurrer upon non-Federal grounds, this Court stated the law of the case assuming that it would ultimately turn on Federal grounds, as follows:

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adopted to that end, and the Supreme Court of Indiana has taken the same view in respect of legislation impairing the obligation of the contract of a state instrumentality. The causes of cancellation provided in the Act of 1927 and the retention of the system of indefinite contracts in all municipalities except townships by the Act of 1933 are persuasive that the repeal of the earlier act by the later was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed." 303 U.S. 95, 108-109.

4. The contract obligation as to each appellant is impaired in a constitutional sense because the impairment results from an unreasonable exercise of the reserved protective power of the State.

The exercise of power by the State of Oklahoma perforce the passage and enforcement of the Act is unreasonable in a constitutional sense, because it required each appellant to foreswear past membership in organizations proscribed by the Attorney General under circumstances under which appellant could not know what organizations had been proscribed. In this connection reference is made to the argument under Point II in which appellants urge that certain requirements of the Oath bear no reasonable relation to the purpose of the Act. Section 2 of the Act (this Brief, Page 4) required an Oath foreswearing, among other things, "that within five (5) years immediately preceding the taking of this Oath, I have not been a member of * * * any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General * * * to be a communist front or subversive organization."

Each appellant at the time he took the Oath (the required time was made within thirty days after the passage of the Act of April 9, 1951) could not know at that time what determinations had been made. Where it is necessary for each appellant, due to any conflict of time or circumstance, to take the Oath a day or so after

the passage of the Act, he could not know whether the Attorney General had made any determinations, either that day, the day before, or a week before the Act was passed. The Act did not require that a list be furnished containing the Attorney General's proscriptions, to any one required to take the Oath, including these appellants. As stated in the argument under Point II of this Brief at Page 63, the Attorney General was not required to publish his determinations. He was to supply them to the Loyalty Review Board. For ought that appellants knew, or may have known, or could have ascertained, he may have made a determination (unpublished), the hour, the day or the week prior to the time the Oath was taken.

If it be asserted that the Supreme Court of Oklahoma, construing the words, "immediately preceding the taking of the Oath," to mean "immediately preceding the passage of the Act," the answer is that each appellant—in fact, any person of ordinary intelligence—could not have anticipated the meaning ultimately discovered by the Oklahoma Supreme Court. Obviously the language of the Oath is ambiguous. The ordinary connotation of the words does not mean what the State court discovered that they meant. Certainly it would not be assumed that membership in subversive organizations, found to be such by the United States Attorney General after the passage of the Act, would raise no presump-

tion of disloyalty, when membership in such organizations so proscribed prior to the passage of the Act would raise a conclusive presumption of disloyalty. Morever, it could not have been surmised that the Legislature regarded as totally irrelevant membership in organizations found to be subversive after the passage of the Act, even though membership may have occurred prior to the passage of the Act. Each appellant would be logical and rational in assuming that if such determinations had a relevance to loyalty, proscriptions made after the passage as to organizations whose affiliation occurred prior thereto were included within the reaches of the Act.

It is hardly reasonable to demand from citizens of the United States, a prescience that would discover with certainty the meaning discovered by the Oklahoma Supreme Court.

The exercise of State power in this regard is the more unreasonable when the Act as here, is construed to deny appellants the opportunity to take the Oath after its meaning had been discovered by the State Supreme Court.

Every word of the Oath requires the jurator to relate his membership in organizations to the proscriptions of the Attorney General made as of the time the Oath is taken.

> "Undoubtedly, whatever is reserved of State power must be consistent with the fair intent of the constitutional limitation of that power. The re-

served power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. *This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.*" (Emphasis supplied.)

Home Building & Loan Assn. v. *Blaisdell et al.*, 290 U.S. 398, 439.

Appellants say that an act that requires the jurator to foreswear past affiliation with groups in language, vague both as to time and as to circumstances, without giving the jurator an opportunity to rebut the presumption of disloyalty thus established, is not a reasonable exercise of the reserved protective power of the State.

But the exercise of State power is unreasonable for another reason. The denial to each appellant of the opportunity to rebut the presumption of disloyalty resulting from past membership in proscribed organizations is an unreasonable exercise of State power. This argument was presented under Point II of this Brief. It was there urged that a conclusive presumption of disloyalty from past membership precluded any reasonable relationship between this requirement of the Oath and the statutory proscription of loyalty as a qualification for public employment. It was there pointed out that this Court sustained the Feinberg Law against any attacks made in the *Adler case*, because the presumption

of disqualification there established was not conclusive in that an opportunity to rebut the presumption was afforded. But in the following cases it was pointed out that the statutory presumption of criminal liability in one and civil liability in the other denied due process, because the presumption was arbitrary in that a fair opportunity to repel the presumption was denied.

In *Western & A.R.R.* v. *Henderson*, 279 U.S. 639, a Georgia statute was held offensive to due process under the Fourteenth Amendment that provided:

> "A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." 279 U.S. 639, 640.

This Court reversed a judgment for damages under this statute recovered by the wife for the death of her husband, killed at a grade crossing of a public highway and appellant's railroad, in a collision between a motor truck that the husband was driving and one of appellant's trains. The Court held:

> "A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." 279 U.S. 639, 642.

In *Manley* v. *State of Georgia*, 279 U.S. 1, there was involved a Georgia statute held by the Georgia Supreme Court to mean that upon proof of insolvency of a Bank, it is presumed to be fraudulent, and an accused president or director is presumed to be guilty in that the State is only required to prove that the bank was under the management and control of the accused, and that it became insolvent while it was within the management and control of the defendant, either by himself alone or conjointly with associates in its management. In the *Manley case*, like the case at Bar, there was involved a conclusive presumption of guilt based upon an indefinite standard. This Court in the *Manley case* said:

> "The presumption here involved does not rest upon any definite basis. It is raised upon proof of any one or more of the conditions described as insolvency and without regard to the facts from which such condition resulted. The statute does not specify the elements of the offense; and so the inference is not restricted to any particular point or specific issue. The facts so to be presumed are as uncertain and vague as the terms 'fraudulent' and 'fraud' contrasted with 'fairly,' 'legally,' 'honestly,' and 'in accordance with law,' when used to describe the management of a bank. * * * Nor is the generality of the presumption aided by the allegations of the accusation. The indictment merely follows the general words of the statute without specifying facts to disclose the nature or circumstances of the charge. * * * And as to guilt, also, the presumption is sweeping. It extends to all directors. There may be from 3 to 25. The president is required to be a director.

"The presumption extends to the *corpus delicti*, as well as to the responsibility of the president or director accused. The proof which makes a *prima facie* case points to no specific transaction, matter or thing as the cause of the fraudulent insolvency or to any act or omission of the accused tending to show his responsibility. He is to be convicted unless he negatives every fact, whether an act or omission in the management of the bank, from which fraudulent insolvency might result, or show that he is in no way responsible for the condition of the bank." 279 U.S. 1, 6-7.

---

5. The contract obligation as to appellants, Lee, Correll, Baum, Schmoe and Nietz, each believing it to be against the Will of God for one to bear arms against his fellowman, is impaired because it is an unreasonable exercise of the reserve protective power of the State to forfeit their contracts of employment and deny them compensation thereunder for the failure of each of them to swear that he will bear arms.

Under Point IV of this Brief, it has been urged by each of the named appellants that as to him that part of the Oath requiring a promise to bear arms, under the pain of forfeiture of a contract of employment and the denial of compensation thereunder for services rendered, violates the due process provision of the Fourteenth Amendment in that under the circumstances this requirement of the statute is a law respecting the free exercise of religion. The cases cited under Point IV of this Brief are applicable here.

If this Court agrees with the view of these appellants that such is the necessary operation and effect of the

statute here under attack, then it follows that the Act in that respect is an unreasonable exercise of State power. It is an unreasonable exercise of State power to create a conclusive presumption of disloyalty for one's failure to take an oath to bear arms if such failure is due to the belief that such an oath is contrary to the Will of God. The forfeiture of the contract of each appellant or a denial to him of compensation due thereunder for services rendered would amount to an impairment of the obligation of that contract.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgdment of the court below should be reversed and that said judgment be reversed with directions to the Supreme Court of the State of Oklahoma that a mandatory injunction be issued, requiring the Board of Regents of Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, to make payment to each appellant under his contract of employment for amounts due to the end of the fiscal year ended June 30, 1951.

Respectfully submitted,

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Attorneys for Appellants.

AUGUST, 1952.

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No. 14

In the

Supreme Court of the United States

(OCTOBER TERM, 1952)

ROBERT M. WIEMAN; NANCY KENT ZIEBUR; WERNER C. BAUM; SAMUEL HUNT LEE, JR.; MALCOLM CORRELL; LILLIAN A. SCHMOE, and LUELLA NIETZ,
Appellants,

VERSUS

PAUL W. UPDEGRAFF; THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, State Treasurer of the State of Oklahoma, and WILBURN C. CARTWRIGHT, State Auditor of the State of Oklahoma,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF APPELLEE, PAUL W. UPDEGRAFF

PAUL W. UPDEGRAFF,
Norman, Oklahoma,
Attorney for Appellees.

September, 1952.

UTTERBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY, PH. 3-8780

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF APPELLEE, PAUL W. UPDEGRAFF

The brief filed by this Appellee in the Supreme Court of Oklahoma, the Court below, answers the questions raised by the Appellants in this Court and is adopted as the Appellee's brief herein.

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No. 35160

In the Supreme Court of the State of Oklahoma

THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES, A. S. J. SHAW, State Treasurer of the State of Oklahoma, and WILBURN C. CARTWRIGHT, State Auditor of the State of Oklahoma,
Plaintiffs in Error,

Also

ROBERT M. WIEMAN, NANCY KENT ZIEBUR, WERNER C. BAUM, SAMUEL HUNT LEE, JR., MALCOLM CORRELL, LILLIAN A. SCHMOE, LUELLA R. NIETZ and ABOULHASSAN ZIRAKZADEK,
Intervenors, Plaintiffs in Error,

VERSUS

PAUL W. UPDEGRAFF,
Defendant in Error.

BRIEF OF PAUL W. UPDEGRAFF, DEFENDANT IN ERROR

The parties will be referred to as they appeared below. The defendant in error, Paul W. Updegraff, will be called the plaintiff; the plaintiff in error, the Board of Regents of the Oklahoma Agricultural Colleges, will be called the Board of Regents; the plaintiff in error, A. S. J. Shaw, State Treasurer of the State of Oklahoma, will be called the Treasurer; the plaintiff in error, Wilburn C. Cartwright,

State Auditor of the State of Oklahoma, will be called the Auditor; and the plaintiffs in error, the intervenors, will be called the intervenors.

STATEMENT OF THE CASE

This is an action filed on behalf of the plaintiff for injunction against the defendants hereinabove named to enjoin, after the effective date of the Act, the payment of compensation or expenses to employees of the Board of Regents of the Oklahoma Agricultural Colleges who have not taken the oath or affirmation required by Enrolled House Bill No. 8 of the Twenty-third Legislature. A temporary restraining order was issued and the case was heard upon permanent injunction and a permanent injunction was granted. Certain interpleaders were permitted to intervene.

At the outset, we agree with the interpretation in paragraph one of the Attorney General's letter dated April 30, 1951, addressed to Governor Murray wherein the opinion reads:

> "* * * the payment of compensation or expenses to public officers and employees who have not taken said oath is not prohibited until on and after May 9, 1951. * * *"

We do not necessarily agree with the reasons given for so holding but rather would say the language of the statute is explicit. Therefore, payment of compensation or expenses to public officers and employees can be made by the Board of Regents of the Oklahoma Agricultural Col-

leges, the State Auditor, and State Treasurer, without regard to the oath, for the first nine days in May, 1951.

Petition

(C-M. 7-9)

"Comes now the plaintiff and for cause of action against the defendants alleges and states:

"1. That he is a tax payer and citizen of the State of Oklahoma.

"2. That the defendant, the Board of Regents of the Oklahoma Agricultural Colleges, has charge of all monies appropriated by the State Legislature of the State of Oklahoma and the power and authority to expend all funds appropriated by the legislature or by congress for said colleges.

"3. That A. S. J. Shaw, defendant herein, is the State Treasurer of the State of Oklahoma.

"4. That the defendant, Wilburn C. Cartwright, is the State Auditor of the State of Oklahoma.

"5. That the 1951 legislature of the State of Oklahoma passed a bill known as the 'loyalty oath' wherein it is provided that any person employed by the State of Oklahoma, before receiving any monies from the State Treasurer, shall subscribe to a 'loyalty oath.'

"6. That the defendant, the Board of Regents of the Oklahoma Agricultural Colleges, have in their employ certain teachers, professors, and other employees, some of whom are citizens of the State of Oklahoma and others are visiting professors from other countries and are non-citizens of the United States, who have refused, failed and neglected to subscribe to the oath as provided by law, and the said persons who have

failed to subscribe to the oath, on or about the 9th day of May, 1951, will prepare and file a salary claim for the month of May, 1951.

"7. That by reason of their failure to subscribe to the said loyalty oath, each employee failing to so subscribe and file the same with the head of their respective institution is not entitled to be paid from state funds for the month of May, 1951. That plaintiff has no adequate remedy at law.

"WHEREFORE, plaintiff prays judgment against the defendants, the Board of Regents of the Oklahoma Agricultural Colleges, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, perpetually enjoining and restraining them from paying any of the employees of the Oklahoma Agricultural Colleges for the month of May, 1951, or any other month until such period of time as each employee paid has subscribed to the oath as provided in Enrolled House Bill No. 8 passed by the Twenty-third Legislature, and that the defendants hereinabove named shall be enjoined from paying salaries or reimbursement for expenses incurred by any teacher, professor and other employees; and that the defendants herein named or institution, in and for which the person executing the oath or affirmation is employed or appointed or elected, shall be enjoined from accepting after midnight May 9, 1951, any oaths other than the oaths such teachers, professors and other employees may have filed with the proper head or public authority for said institution, provided that the teachers, professors and other employees who are on authorized leave on May 9th, 1951, may take and subscribe said oath or affirmation by midnight June 8, 1951.

(Signed) "Paul W. Updegraff,
"Attorney for Plaintiff."

Answer
(C-M. 60-62)

"Comes now the above-named defendants, and each of them, and in answer to the petition of plaintiff herein and in response to the 'Temporary Restraining Order' issued in this cause, allege and state:

"1. That the material allegations of fact set forth in the petition are not sufficient to constitute a cause of action in favor of plaintiff and against defendants.

"2. Defendants admit the material allegations of fact set forth in Paragraphs 1 to 6 of plaintiff's petition.

"3. That the teachers, professors and other employees referred to in Paragraph 6 of the petition were employed by the defendant, Board of Regents for the Oklahoma Agricultural and Mechanical Colleges, prior to April 9, 1951 (the effective date of the act mentioned in Paragraph 5 of the petition) to teach and otherwise serve in said colleges on a contract basis during the fiscal year ending June 30, 1951, and hence, by virtue of that part of Section 15, Article 2 of the Oklahoma Constitution which provides that no law 'impairing the obligation of contracts shall ever be passed,' the provisions of said act (House Bill No. 8 of the Twenty-third Oklahoma Legislature) are not applicable to said contracts or to the May, 1951 salary claims mentioned in said petition, and therefore the defendant board, treasurer and auditor should not be enjoined from approving and paying the claims referred to in Paragraph 6 of the petition.

"4. That the teachers, professors and other employees referred to in Paragraph 6 of the petition have not been, and cannot lawfully be, employed by the defendant Board to teach or otherwise serve in the colleges mentioned in the petition during the fiscal year ending June 30, 1952, or during any succeeding fiscal year, except after the beginning of each such year,

hence the prayer for injunctive relief set forth in the petition as to salary claims of said teachers, professors and other employees for any such future fiscal year, is premature and not susceptible of fulfillment.

"WHEREFORE, premises considered, defendants respectfully ask the court to deny plaintiff the injunctive relief prayed for by him.

"Mac Q Williamson
"Attorney General of Oklahoma

"Fred Hansen
First Assistant Attorney General
"Attorneys for Defendants

"(verified.)"

Reply

(C-M. 69-70)

"Comes now the plaintiff and for his reply to the answer of the defendants and each of them filed herein, and denies each and every material allegation set forth in the answer except those that may be hereinafter specifically admitted.

"Plaintiff specifically denies that Enrolled House Bill No. 8 passed by the Twenty-third Legislature impairs the obligations of contract existing between the Board of Regents for the Oklahoma Agricultural and Mechanical College and teachers, professors, and other employees, and that said Act is applicable to all contracts and to the May, 1951, salary claims, and therefore the defendant Board of Regents, State Treasurer, and State Auditor should be enjoined from approving and paying the said claims.

"Plaintiff says that the Act as passed by the legislature is constitutional and valid in all things.

"Plaintiff specifically denies that other employees, except teachers and professors, are employed on a basis of the school term and says they are employed only on the basis of month to month, do not hold any written or oral contract, and may be discharged at any time by the defendant Board of Regents for the Oklahoma Agricultural and Mechanical College or the President of the institution or the heads of departments under whose supervision the employee may work.

"Plaintiff specifically denies that the prayer for injunctive relief set forth in the petition as to salary claims for these said teachers, professors and other employees for any future fiscal year is premature, and says that unless the defendants and each of them are enjoined that monies will be paid from the state treasury in direct violation of law.

"WHEREFORE, premises considered, plaintiff respectfully asks this court to grant him permanent injunctive relief as prayed for in his petition.

(Signed) "Paul W. Updegraff
"Paul W. Updegraff
"Plaintiff

"(Verified)."

THE EVIDENCE

Stipulations (C-M. 86-90)

(See Intervenors Brief, pages 15-18.)

Journal Entry of Judgment

(C-M. 235-246)

Findings of Facts

"The Court finds the facts in this case to be as set forth in the stipulations entered into by and between the parties, and that the parties have agreed that the case comes on for hearing on the permanent injunction."

Conclusions of Law

"1st: The court concludes that the plaintiff is a taxpayer and citizen of the State of Oklahoma and a proper party to bring this action. It is so ordered.

"2nd: The Court concludes that the effective date of Enrolled House Bill No. 8 passed by the Twenty-third Legislature is midnight May 9th, 1951; and it is so ordered.

"3rd: The Court concludes that the teachers, professors, and other employees of the defendant, Board of Regents, may be paid from State funds for the first nine days of May, 1951; and it is so ordered.

"4th: The Court concludes that each teacher, professor and employee who has wilfully or negligently failed to take and subscribe to the oath, as provided in Section 2, Enrolled House Bill No. 8, by midnight May 9th, 1951, cannot be paid from State funds, after midnight May 9th, 1951, and concludes that any teacher, professor and employee absent from the State May 9th, 1951, on authorized leave, may be paid regularly and as provided by law during the time of any such absence on authorized leave, and up to and including thirty (30) days after terminating such leave and returning to work or to the duties of the office or employment of such person; and thereafter in usual and proper form, provided that such person has, during such thirty-day period after returning from said leave,

taken said oath in manner and form as prescribed by law, unless an honest mistake or clerical error has been made in any oath that might have been filed, in which event a correction may be made or an amended oath filed, to clearly set it out; it is so ordered.

"5th: The Court concludes that each teacher, professor and employee who has taken and subscribed to an oath by midnight May 9, 1951, and filed it with the officer, agency, authority, department, commission, or institution in and for which the person executing the oath or affirmation is employed or appointed or to which said person is elected, and which oath taken and subscribed is not the oath provided in Section 2 of the Act, cannot take and subscribe to a new oath, unless an honest mistake or clerical error has been made in the preparation of the oath signed; that such teacher, professor and employee who fails to take and subscribe to the oath or affirmation required in said Act has forfeited his or her right to receive pay; it is so ordered.

"6th: The Court concludes that the intervenors, and each of them, did not take and subscribe to the oath as provided in Section 2 of the Act and wilfully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated. It is so ordered.

"7th: The Court concludes that the words 'if necessary', following the phrase, 'I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary', mean that the Congress of the United States within the powers granted them under the Constitution of the United States and the various selective service laws passed by the Congress will determine when and if it is necessary for any person taking and subscribing to the oath in this

Act to bear arms; that such proviso is constitutional. It is so ordered.

"8th: The Court concludes that non-citizens of the United States employed by the State must take and subscribe to the oath as provided in the Act, and that the words, 'if necessary' following the phrase, 'I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary', as applied to them does not violate any of the constitutional rights guaranteed them under the Fourteenth Amendment, or other Constitutional or statutory provisions of the United States, or the Constitution of any statutory provisions of the State of Oklahoma, nor does it violate any treaty agreement with other nations or between the signers of the United Nations. The Congress of the United States, in various selective service legislative acts, has provided for the type of military service, if any, the nationals of other countries must render, taking into consideration the treaty agreements with each country and between the United Nations. It is so ordered.

"9th: The Court concludes that that portion of the said oath which requires the teachers, professors and employees of the defendant Board of Regents, including these intervenors, to state:

> 'I am not affiliated directly or indirectly * * * with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; * * *'

and to further state:

> '* * * that within the five (5) years immediately preceding the taking of this oath (or affirmation)

> I have not been a member * * * of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization,'

are valid provisions of the law. The Court concludes that said provisions are constitutional in all respects and are applicable to any such organization which prior to April 9, 1951, has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization, and the words 'officially determined' mean such listed organizations as have been afforded an opportunity to present their case; *Joint Anti-Fascist Refugee Committee, Petitioner, v. J. Howard McGrath, Attorney General of the United States et al.* (decided by the Supreme Court of the United States April 31, 1951), and it was the express intention of the legislature, by the words 'has been' to mean only those organizations found to be subversive prior to the effective date of the Act, to-wit: April 9, 1951, and does not apply to any organization declared to be subversive after April 9, 1951, and the Court concludes that the legislature may adopt by reference any report or lists of the United States Attorney General or other authorized agency of the United States wherein it has been officially determined that any organization is a communist front or other subversive organization. It is so ordered.

"10th: The Court concludes that the legislature had the right, within the 'police power', to enact legislation affecting the vital welfare of the State and Nation, and that Enrolled House Bill No. 8 passed by the Twenty-third Legislature does not impair the obligation of contracts; it is so ordered.

"11th: The Court concludes and does hereby take judicial notice of the threat to our liberties and way of life, and that prior to the passage of this Act a person could obtain a job in our colleges, universities and public schools without declaring his loyalty to his employer, the people of the State of Oklahoma, and of the stress of the times and the need for protection from our enemies, foreign and domestic, and of the advocacy of persons, groups and organizations to overthrow our government by force and violence; and that the legislature of Oklahoma, in the exercise of its police powers, has wide discretion in determining what is necessary, as an exercise of police power, to protect the general welfare of its people, and so far as constitutional issue is concerned the power of the State, when otherwise justified, is not diminished because of a private contract which may be affected. All contractual obligations between the Board of Regents and teachers, professors and employees, including the intervenors, are subject to Enrolled House Bill No. 8 of the Twenty-third Legislature; it is so ordered.

"Now, it is the further order of this Court that in the event the Board of Regents found that an honest mistake has been made in the oath so filed, in the name, designation of the position held, or any other clerical error, that said error may be corrected by the taking of a new oath.

"12th: The Court concludes that the injunction should be made permanent in all things as prayed in plaintiff's petition; it is so ordered.

"13th: The Court concludes that there may be clipped to the original oath a statement of a non-citizen, if he so desires, the following statement:

'I further state that I am a citizen, or subject, of _____, and that I have taken the foregoing

oath, subject to my allegiance to, and rights and obligations, as a citizen, or subject, of .....

'Dated this ..... day of ....., 1951.'

and upon timely filing thereof, his rights to receive compensation shall not be prejudiced.

"14th: In view of the findings and judgment of this Court, this 21st day of May, 1951, made in this litigation and this hearing, to the effect that non-nationals may be permitted to execute an additional and explanatory statement along with their oath of allegiance, the Court now finds and concludes that all non-nationals who have heretofore, because of misunderstanding or honest mistake, have failed, up to this time, to execute the oath in the manner and form as provided herein, together with the explanatory statement, as provided herein, that all such non-nationals may have a reasonable time after the execution of this judgment, this date, by the Court, within which to properly prepare, take and file said oath, not to exceed 10 days; and it is so ordered.

"IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that the injunction should be made permanent in all things as set forth in the conclusions of law, and that intervenors' petition for mandatory injunction is in all things denied, and costs are assessed against the defendants and the intervenors. Exceptions allowed to all parties."

We now proceed to the following propositions. For the sake of brevity each proposition will be stated, then discussed.

Proposition I.

Oath does not impair obligation of contract.

The non-Communist statement here involved is a condition of employment; there is no issue as to freedom of religion, thought, or speech. In our brief we will cite the unbroken line of cases throughout the country upholding the requirement of a non-Communist statement as a condition of employment.

Any person holding a contract of employment with the Board of Regents of the Oklahoma Agricultural Colleges for a fixed period ending on or prior to the expiration of the current fiscal year, who failed to subscribe to the oath as required by law, cannot be paid compensation after midnight May 9, 1951.

The passage of the "oath law" does not impair the obligations of contracts under Section 15, Article 2 of the State Constitution.

In the case of *State ex rel. Roth, Trustee* v. *Waterfield, Court Clerk*, 167 Okla. 209, 29 Pac. (2d) 24, our Court held:

> "The right of the Legislature to act under the police power of the state is a part of the existing law at the time of the execution of every contract, and as such becomes in contemplation of law a part of that contract.
>
> "Situations may arise which justify an extension of the police power of the state to remedy economic conditions, but when such power is undertaken to be exercised with that object in view to the detriment of one class of persons, appropriate provisions for protecting the rights of that class of persons and pro-

viding compensation for rights infringed upon should be provided."

This principle of law is supported by the Supreme Court of the United States in a mortgage moratorium case in the case of *East N. Y. Sav. Bank* v. *Hahn*, 66 Sup. Ct. 69, 326 U. S. 230, 90 L. Ed. 34, 160 A. L. R. 1279, holding:

"When a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the state to safeguard vital interests of its people is not to be denied by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.

"The protective power of the state to safeguard vital interests of its people may be treated as an implied condition of every contract and as such as much part of contract as though it were written into it, whereby state's exercise of its power enforces and does not impair a contract.

"The police power is an exercise of sovereign right of the government to protect the general welfare of the people, and is paramount to any rights under contracts as between individuals. U. S. C. A. Const. art 1, Sec. 10.

"A state legislature has wide discretion in determining what is necessary as an exercise of police power, to protect the general welfare of its people, and, so far as constitutional issue is concerned, the power of the state when otherwise justified is not diminished because a private contract may be affected. U. S. C. A. Const. art. 1, Sec. 10."

All contractual obligations are subject to police power. See cases digested U. S. Supreme Court Digest, Constitutional Law, Key No. 117.

Certainly the public interest today in the protection of this nation against its enemies, within and without, from the overthrow of our Government by force and violence, gives to the Legislature wide discretion in determining what is necessary in exercising its police power to protect the general welfare of the people. The oath law is a protection against disloyalty to our Government.

We assert that the Supreme Court of Oklahoma and the Supreme Court of the United States will take judicial knowledge of conditions affecting this nation by reason of the Hiss trials, the Communist trials in New York, the *Fuch* case, and the disloyalty of many of our citizens in giving treasonable aid to our enemies, and that the ideology of Communism means an advocacy of the overthrow of our existing Government by force and violence. See *Denver Producing and Refining Co.* v. *State et al.*, 199 Okla. 171, 184 Pac. (2d) 961.

Proposition II.

The cases explicitly and unanimously hold an oath or affirmation of loyalty may lawfully be required as a condition to public employment.

This case is concerned with the validity of a non-Communist affirmation as a condition of employment. It

is recognized as a general principle,[1] and has been applied specifically in many cases holding (1) that a policy against employing Communists is valid and does not involve an illegal political test, and (2) that the requirement of the anti-Communist oath or affirmation is a valid implementation of such a policy.

In *American Communications Ass'n* v. *Douds* (1950), 339 U. S. 382, the Supreme Court upheld the constitutionality of amended Section 9(h) of the Labor Relations Act. This section requires that officers of certain labor unions execute an affidavit (quoted 339 U. S. 385-386) stating among other things that the affiant "is not a member of the Communist party or affiliated with such party." The statutory penalty for noncompliance is that the union concerned loses privileges granted by the statute (339 U. S. 385), a more serious thing, in the judgment of the Court, than mere "loss of position" by an individual (339 U. S. 392). In the main opinion by CHIEF JUSTICE VINSON the Court said (pp. 390-392):

"There can be no doubt that Congress may, under its constitutional power to regulate commerce among

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[1] **McAuliffe v. Mayor etc. of City of New Bedford** (1892), 155 Mass. 216, 29 N. E. 517, quoted in **Steiner v. Darby** (1948), 88 Cal. App. (2d) 481, 487; **Christal v. Police Commission** (1939), 33 Cal. App. (2d) 564, 568 (upholding dismissal of police officer for refusing on constitutional grounds to answer questions of the grand jury).

In the **McAuliffe** case, which involved a policeman dismissed for violating a department rule against soliciting political funds, the court, speaking through Justice Holmes, overruled the policeman's claim that the rule was invalid "as invading the petitioner's right to express his political opinion" and said (29 N. E. 517, quoted 88 Cal. App. 2d 487):

> "One answer to this argument * * * is that there is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. **The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.** There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of this contract."

the several States, attempt to prevent political strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce. *We think it is clear, in addition, that the remedy provided by sec. 9(h) bears reasonable relation to the evil which the statute was designed to reach. Congress could rationally find that the Communist Party is not like other political parties* in its utilization of positions of union leadership as means by which to bring about strikes and other obstructions of commerce for purposes of political advantage, and that many persons who believe in overthrow of the Government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy.

"The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. In re Summers, 325 U. S. 561 (1945); *Hamilton v. Regents*, 293 U. S. 245 (1934).

* * * * * * * *

"In this respect, sec. 9(h) is not unlike a host of other statutes which prohibit specified groups of persons from holding positions of power and public interest because, in the legislative judgment, they threaten to abuse the trust that is a necessary concomitant of the power of office.

"If no more were involved than possible loss of position, the foregoing would dispose of the case."

The present case *does involve no more than loss of position*, and the above ruling in itself, we submit, demonstrates the absence of merit in petitioners' political test contention. In the *Douds* case, however, the Supreme Court

went on to uphold Section 9(h), including the requirement of the non-Communist oath on broader grounds. Stating that "Communists, we may assume, carry on legitimate political activities" (339 U. S. 393)—petitioners' contention here—and further that "Beliefs are inviolate," the Court pointed out that the oath actually did discourage the lawful exercise of political freedoms since in practical fact unions would be discouraged from electing Communists to office (339 U. S. 393). The Court held, nevertheless, that the statute including the requirement of the oath, was valid (339 U. S. 393-412). During this discussion the Court emphasized again the distinction between a non-Communist requirement which "punishes" or "forbids" and one which is a condition of office or employment. The Court said (p. 408):

> "As thus construed, we think that the 'belief' provision of the oath presents no different problem from that present in that part of the section having to do with membership in the Communist Party. Of course we agree that one may not be imprisoned or executed because he holds particular beliefs. *But to attack the straw man of 'thought control' is to ignore the fact that the sole effect of the statute upon one who believes in overthrow of the Government by force and violence—and does not deny his belief—is that he may be forced to relinquish his position as a union leader.* That fact was crucial in our discussion of the statute as it relates to membership in the Communist Party."

And further (p. 409):

> "To hold that such an oath is permissible, on the other hand, is to admit that the circumstances under which one is asked to state his belief and the consequences which flow from his refusal to do so or his

disclosure of a particular belief make a difference. The reason for the difference has been pointed out at some length above. *First, the loss of a particular position is not the loss of life or liberty.* We have noted that the distinction is one of degree, and it is for this reason that the effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts in determining whether the balance struck by Congress comports with the dictates of the Constitution. But it is inaccurate to speak of sec. 9(h) as 'punishing' or 'forbidding' the holding of beliefs, any more than it punishes or forbids membership in the Communist party."

The Supreme Court in the *Douds* case expressly distinguished *West Virginia Board of Education* v. *Barnette* (1943), 319 U. S. 624. The *Barnette* case involved a State statute requiring children in public schools to salute the flag and pledge allegiance, and the statute provided criminal penalties for noncompliance on both the children and their parents. Such a case is not relevant to a case involving an anti-Communist oath, affirmation, or statement *as a condition of employment.* The Supreme Court in the *Douds* case distinguished the *Barnette* case on that ground, saying (339 U. S. 404, n):

"In the *Barnette* case, the Court was careful to point out that the sole interest of the State was in securing uniformity of belief by compelling utterance of a prescribed pledge, and that refusal to comply with the State order resulted in punishment for both parent and child" (The court then quoted, 319 U. S. 630-631).

As noted above the *Douds* case also answers such arguments by defendants as that the means adopted by the Legislature to implement the policy that Communists shall not be allowed to teach are "naive indeed." Holding the anti-Communist oath to be a reasonable means of effecting the policy behind it, the Supreme Court said (339 U. S. 390-391):

> "We think it is clear, in addition, that the remedy provided by sec. 9(h) bears reasonable relation to the evil which the statute was designed to reach."

Reference should also be made to the opinion of MR. JUSTICE JACKSON in the *Douds* case. This summarizes grounds which justified Congress in making different provision as to Communists than as to other parties (339 U. S. 422-433). The opinion opens as follows (p. 422):

> "If the statute before us required labor union officers to forswear membership in the Republican Party, the Democratic Party or the Socialist Party, I suppose all agree that it would be unconstitutional, but why, if it is valid as to the Communist Party?
>
> "The answer, for me, is in the decisive differences between the Communist Party and every other party of any importance in the long experience of the United States with party government."

The opinion further states (339 U. S. 424):

> "From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our con-

stitutional system. Although and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics."

The five conclusions stated by MR. JUSTICE JACKSON, omitting his well documented supporting discussion, are:

"1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate (339 U. S. 425).

"2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government (339 U. S. 427).

"3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal (339 U. S. 429).

"4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement (339 U. S. 430).

"5. Every member of the Communist Party is an agent to execute the Communist program" (339 U. S. 431).

Passing now from the *Douds* case, earlier Federal cases which uphold amended Section 9(h) of the Labor Relations Act, including the requirement of the non-Communist oath, were *Inland Steel Co.* v. *National Labor Relations Board* (7 Cir., 1949), 170 Fed. (2d) 247, 265-266, and *National Maritime Union of America* v. *Herzog* (D. C., 1948), 78 Fed. Supp. 146, 162-164.

On September 23, 1950, Congress enacted the Internal Security Act of 1950 (Public Law No. 831, c. 1024, 81st

Cong., 2d Sess.). This statute covers forty pages of small print in the U. S. Code Congressional Service (1950, No. 10, pp. 3740-3780), but parts of it are quoted and the rest is summarized in the appendix of this brief (pp. I-VII). This statute, while providing that mere membership or office-holding in a Communist organization is not an offense (Sec. 4[f], U. S. Code Congressional Service, *supra*, p. 3745), also provides that no members of a Communist organization required to register may hold any nonelective office or employment under the United States or with any defense facility (Sec. 5, quoted appendix to this brief, pp. VI-VII). Non-Communist statements from individuals plus registration and reports from Communist organizations are among the means which the statute provides for its implementation. These provisions would be unconstitutional if petitioners' contentions were accepted as law.

In the Appendix (pp. VIII-X) is printed an extract from the Congressional Committee's report recommending passage of the Internal Security Act of 1950. This sets forth the facts regarding Communism which required and justified the legislation—facts similar to those noted by the Supreme Court in the *Douds* case (339 U. S. 382, *supra*).

Among many matters bearing on implementation of the statute the Congressional Committee noted that "*20 States require teachers to take loyalty oaths*" (Appendix, p. X). There is, to the best of our knowledge, no case invalidating such a requirement in any state. Cases upholding the oath are *L'Hommedieu* v. *Board of Regents of the University of the State of New York* (1950), 276 App. Div. 494, 95 N. Y. S. (2d) 443, and the companion

case of *Thompson* v. *Wallin* (1950), 276 App. Div. 463, 95 N. Y. S. (2d) 784, 301 N. Y. 476, 95 N. E. (2d) 806, upholding the same statute, this time in an action to enjoin its enforcement brought against the Regents by the Chairman and Secretary of the Communist Party in the state. See also concurring opinion in *Hammond* v. *Lancaster* (Md., 1950), 71 Atl. (2d) 483, 485.

The Court said (95 N. E. [2d] 811-812):

> "Concerned, as we are, with the qualification for public employment in the vital field of education, we regard the law here challenged as an effort by the Legislature to insert a new strand in the mesh by which a screening process is accomplished in the selection of those who teach the State's children. Strands which serve a like purpose are found in section 3002 of the Education Law, which denies to any person the right to serve as a teacher in a public school until he or she shall have taken and subscribed an oath to support the Federal and State Constitutions; also in section 801 *id.*, which requires that in all public schools instruction shall be given in 'patriotism and citizenship.' As the Legislature has authority over the discipline and efficiency of public service, we think its judgment, as expressed in the restrictive provisions of the statute under review, bears a reasonable relation to the legislative purpose to safeguard the public school system (Citing *American Communications Ass'n* v. *Douds*, 339 U. S. 405, and many other cases). Those cases stand for the legal principle which prompted JUDGE HOLMES —as he then was—to write in *McAliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517, the familiar statement: 'The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman'!"

In Maryland there is a constitutional oath (Maryland Constitution, Art. 1, Sec. 6), together with a constitutional provision—"nor shall the Legislature prescribe any other oath of office than the oath prescribed by the Constitution" (Maryland Declaration of Rights, Art. 37). Maryland nevertheless requires a loyalty oath of teachers in state supported schools. In *Hammond* v. *Lancaster* (Md., 1950), 71 Atl. (2d) 483, the validity of this oath was attacked by a teacher in Morgan College as well as by the Chairman and Labor Secretary of the Communist Party. The Court declined jurisdiction on technical grounds. The Chief Justice in a concurring opinion referred to the status of the teacher and said with regard to her obligation to make the loyalty statement (71 Atl. [2d] 485):

> "We think she, and other people similary situated, can be lawfully required to make such a statement. It is an arrogant assumption that a government cannot protect itself against the infiltration of those who desire to destroy it by force. * * * No one has a right to be a public employee. *McAuliffe* v. *Mayor*, 155 Mass. 516, 29 N. E. 517 (Justice Holmes). No fundamental rights are destroyed by not employing or by not keeping in public employment those who cannot or will not satisfy the appointing authority that they are not subversive persons."

The above ruling was approved by the Court in *Shub* v. *Simpson* (Md., 1950), 76 Atl. (2d) 332, where in sustaining a statute requiring a loyalty oath of political candidates, the Court said (76 Atl. [2d] 339-340):

> "Appellants also attack Chapter 86 as a whole on various grounds, all of which were discussed in appellee's brief filed in the *Hammond* v. *Lancaster*

case, *supra*, to which reference is made by appellants here. These grounds are that it abridges the fundamental rights of freedom of speech, press and assembly, that it is vague and indefinite and therefore violates due process, that it is a bill of attainder, that it attempts to establish guilt by association, and other similar contentions. It is contended that the act is basically inseparable in its provisions, and, therefore, it should be stricken down in its entirety.

"If we assume that these appellants have any standing in this case to make these contentions (which we do not decide) we think they have been recently fully discussed and disposed of in three recent decisions by the Courts of the United States. These are *Dunne* v. *United States*, 8 Cir., 138 F. 2d 137 and *United States* v. *Dennis* 2 Cir., 183 F. 2d 201 passing upon the Smith Act, 18 U. S. C. A. sec. 2385, and *American Communications Association* v. *Douds*, *supra*, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed.—which approved the oath required by the Taft-Hartley Act, 29 U. S. C. A. sec. 141 *et seq.* We do not think it necessary to repeat what has been said in these cases. We are unable to find that the statute before us, on its face, violates any of the fundamental rights of appellants, or that it is susceptible of an interpretation which makes it necessary for the courts to strike it down. On the contrary, there is a presumption in favor of its validity, and there has been presented to us no argument which impairs or rebuts that presumption."

The case of *Thorp* v. *Board of Trustees* (N. Y., 1951), 79 Atl. (2d) 462, upheld a statute requiring faculty members in all state supported schools, colleges and universities to subscribe to an "oath of allegiance and office," which covers the subject matter of the present loyalty statement and more. The plaintiff, a member of a college

faculty, claimed that the statute was contrary to a provision of the New Jersey Constitution quoted and relied on by petitioners. The Supreme Court of New Jersey overruled this contention, and did so on grounds very similar to those urged by us here. The Court in part said:

> "First, it is contended that the oath of allegiance thus directed qualifies the oath prescribed for State officers by Article VII, Section I, paragraph 1 of the Constitution of 1947, and the act is therefore, in this respect at least, unenforceable as a legislative interference with an exclusive constitutional prescription and an enlargement of constitutional qualifications within the principle of *Imbrie* v. *Marsh*, 3 N. J. 578 (1950). We think not.
>
> "Teaching is a profession; and in New Jersey the practioners of the profession in the public school system are not deemed public officers. At the outset, the relationship between the public school teacher and the school authority is contractual in nature. The attainment of the tenure provided by R. S. 18:13-16 and R. S. 18:13-17 does not convert the teacher's employment into a public office. Tenure as therein ordained is a mere 'legislative status' subject to legislative alteration and annulment (citing many cases). Teaching in the public schools does not involve the exercise of governmental powers, either of the State or the school district, and so the teacher is not an officer either of the State or the local corporate body."

In *Steiner* v. *Darby* (1948), 88 Calif. App. (2d) 481, which involved a loyalty statement required of county employees, the Court said (88 Calif. App. [2d] 491):

> *"There is nothing in the foregoing rule or affidavit which in the slightest degree affects the plaintiffs' rights of political belief or religious belief.* Defendants

are simply performing their duty by making proper inquiry of their employees as to their loyalty to their employer, the people of the State of California."

On March 21, 1947, the President issued Executive Order No. 9835 (5 USCA 631, n.) establishing a loyalty program among employees of the Executive Department and setting up a Loyalty Review Board to administer it. Among the activities listed by the Executive Order as justifying dismissal (Part V, Sec. 2, f) is membership in any organization designated by the Attorney General as "Communist." In *Washington v. Clark* (D. C., 1949), 84 Fed. Supp. 964, the Court, denying an injunction sought by post office employees to prevent enforcement of the order, said (p. 966):

> "The Government has a perfect right to pick and choose its own employees, and it would have a perfect right, if it saw fit to do so, to get rid of them for making utterances, which they have a right to make under the Constitution. The Government may not imprison a person for making various utterances, but it may, if it sees fit to do so, dismiss a Government employee who makes such utterances. As was said many years ago by MR. JUSTICE HOLMES, a great champion of personal rights, In *McAuliffe v. The Mayor and Alderman of New Bedford*, 155 Mass. 216, 29 N. E. 517, where a policeman who had been discharged from the service for improper utterances sought reinstatement:
>
> " 'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman'."

A similar case is *Friedman v. Schwellenbach* (App. D. C., 1946), 159 Fed. (2d) 22, 24.

We submit that the authorities are unamimous to the point that a non-Communist statement can lawfully be required as a condition of either public or private employment.

Additional authorities include the very recent case of *Loew's Incorporated* v. *Cole* (1950), Ninth Circuit, 185 Fed. (2d) 641. Cole was under contract as a motion picture writer. He refused to answer questions asked by a Congressional Committee, including the question whether he was a member of the Communist Party. The Court of Appeals held that this justified the employer in terminating Cole's contract for cause.

There is language strongly against petitioners' contentions in *Lawson* v. *United States* (App. D. C., 1949), 176 Fed. (2d) 49, and *Barsky* v. *United States* (App. D. C., 1948), 167 Fed. (2d) 241, *certiorari* denied, 334 U. S. 843, upholding power of Congressional committees to require answers to questions as to whether the persons concerned were Communists.

In the case of *L'Hommedieu* v. *Board of Regents of University of State of New York* (1950), 276 App. Div. 494, 95 N. Y. S. (2d) 443, upholding a statute providing for dismissal of members of subversive organizations from the school system and requiring loyalty affirmations as part of implementation of the statutory policy, the Court said:

> "When it comes to loyalty to our government, *the affirmation of loyalty*, the denial of disloyalty, renunciation of membership in organizations advocating overthrow of our government or subscribing to subversive tenets, all have been upheld as qualifications

of public employment or of holding office in organizations availing themselves of statutory privileges (Citing cases) (Pages 452-453, 95 N. Y. S. [2d]). * * *"

In the case of *Garner* v. *Board of Public Works*, 98 A. C. A. 694, at page 699, it is said:

"It is, therefore, the duty of those charged with the management of the business of government to ascertain, require, and insure unconditional, unswerving loyalty of every servant of the people, high or low.

"One of the foundation stones of private business is that the employee must be loyal to his employer. Loyalty is implicit in the contract of hiring. No private business can long succeed without the conscientious, undivided support of its employees. The man or woman who denies allegiance to his employment is, and should be, soon separated from it. Nemesis with a club waits for him around the corner. *And so long as the employment continues, every employer has the right at any time to ask his employee to declare his loyalty.*"

The Court also said concerning the position of the petitioners (p. 699):

"'But,' say some of the petitioners, 'we-re loyal. We will take the oath to defend and support the Constitution of the United States and of the State of California. What we object to is that we are required, under oath, to express our beliefs; it inquires into our thinking today, our thinking tomorrow'."

In response, however, the Court said (p. 700):

"That question is not present in this case. The ordinance under consideration does not call for beliefs. It provides that one must aver whether or not he is or ever was a member of the Communist party or the

Communist Political Association; that he has not within five years advocated the overthrow of the government by force, violence, or unlawful means; that he is not and has not been a member of any group, society, association, organization, or party which advises or teaches overthrow of the government by such means; and that while he is in the service of the city he will not belong to or become a member of any such group, or advocate or teach such subversive doctrines.

"The right of the people of the State of California to have their employees *declare* their allegiance to the state, that they are not its enemies, and do not advocate or believe in destroying the state by force, violence or unlawful means, is not trammeled, infringed, or denied by any constitutional provision, by natural justice, or by common sense. The ordinance before this court, adopted by a subdivision of state government, is well within the legislative power, and a timely and proper exercise thereof."

THE CASE OF GIROUARD V. UNITED STATES (1946), 328 U. S. 61, 90 L. Ed. 1084, HAS NO APPLICATION IN THE CASE AT BAR

In 1943, petitioner, a native of Canada, filed his petition for naturalization in the District Court of Massachusetts. He stated in his application that he understood the principles of the Government of the United States, believed in its form of government, and was willing to take the oath of allegiance (Oct. 14, 1940) 54 Stat. c. 876, 8 USCA 735(b), 2 F. C. A., Title 8, Sec. 735(b), but was not willing to respond in the affirmative to a question in the application "if necessary, are you willing to take up arms in defense

of this country?" he replied "No (non-combatant) Seventh Day Adventist."

MR. JUSTICE DOUGLAS said in the opinion:

"* * * the oath required of aliens does not in terms require that they promise to bear arms. *Nor has Congress expressly made any such finding a prerequisite to citizenship.* To hold that it is required is to read into the Act by implication. But we do not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

"* * * There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs. It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of State."

MR. JUSTICE STONE, in dissenting, said:

"No question of the constitutional power of Congress to withhold citizenship on these grounds is involved. *That power was not doubted.* See *Selective Draft Law* Cases. *Arver* v. *United States,* 245 U. S. 366, 62 L. Ed. 352, 38 S. Ct. 159, L. R. A. 1918c 361, Anno. Cases 1918 B 856; *Hamilton* v. *Regents of the University of California,* 293 U. S. 245, 79 L. Ed. 343, 55 S. Ct. 197."

The case of *Hamilton* v. *Regents of the University of California,* 293 U. S. 245, 79 L. Ed. 343, 55 Sup. Ct. 197, was a suit against the Regents to admit students to the university who refused to take a course in military science and tactics. The minors are members of the Methodist Episcopal Church and for many years their fathers have

been ordained ministers. The University of California is a land grant college and under the Morrill Act approved July 2, 1862, 12 Statutes at Large 503, 7 USCA, Sec. 301-8, the university was given certain benefits if it complied with the terms of the Act. Among other provisions the university was to teach a course in military tactics. The Regents require enrollment and participation of able-bodied male students who are citizens of the United States. The State Court denied the petition for a writ of mandate.

"The enforcement of an order of the board of regents of a state university prescribing instruction in military science and tactics as a required course does not unconstitutionally abridge the privileges or immunities of citizens of the United States or deprive any person of liberty without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

"Every citizen owes the duty, according to his capacity, to support and defend the government. Federal and state, against all enemies."

MR. JUSTICE BUTLER:

"Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies. Selective Draft Law Cases (*Arver* v. *United States*) *supra*, 245 U. S. p. 378, 62 L. Ed. 353, 38 S. Ct. 159, L. R. A. 1918c, 361, Ann. Cas. 1918B, 856; *Minor* v. *Happersett*, 21 Wall. 162, 166, 22 L. ed. 627.

"The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. * * * The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general."

MR. JUSTICE CARDOZO (concurring):

"Concurring in the opinion I wish to say an extra word.

"I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states.

"Accepting that premise, I cannot find in the respondents' ordinance an obstruction by the state to 'the free exercise' of religion as the phrase was understood by the founders of the nation, and by the generations that have followed. *Davis* v. *Beason*, 133 U. S. 333, 342, 33 L. ed. 637, 10 S. Ct. 299.

"There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace. The petitioners have not been required to bear arms for any hostile

purpose, offensive or defensive, either now or in the future. They have not even been required in any absolute or peremptory way to join in courses of instruction that will fit them to bear arms. If they elect to resort to an institution for higher education maintained with the state's moneys, then and only then they are commanded to follow courses of instruction believed by the state to be vital to its welfare. This may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely ethical. More must be shown to set the ordinance at naught. In controversies of this order courts do not concern themselves with matters of legislative policy, unrelated to privileges or liberties secured by the organic law. The First Amendment, if it be read into the Fourteenth, makes invalid any state law 'respecting an establishment of religion or prohibiting the free exercise thereof.' Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war.

"The meaning of those liberties has striking illustration in statutes that were enacted in colonial times and later. They will be found collected in the opinion of the lower court in *Macintosh* v. *United States* (C. C. A. 2d) 42 F. (2d) 845, 847, 848, 283 U. S. 605, 632, 75 L. Ed. 1302, 1314, 51 S. Ct. 570, and more fully in the briefs of counsel. From the beginnings of our history Quakers and other conscientious objectors have been exempted as an act of grace from military service, but the exemption, when granted, has been coupled with a con-

dition, at least in many instances, that they supply the army with a substitute or with the money necessary to hire one * * * (Citing cases). For one opposed to force, the affront to conscience must be greater in furnishing men and money wherewith to wage a pending contest than in studying military science without the duty or the pledge of service. Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. On the contrary, the very lawmakers who were willing to give release from warlike acts had no thought that they were doing anything inconsistent with the moral claims of an objector, still less with his constitutional immunities, in coupling the exemption with these collateral conditions.

"Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. *The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government.* One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

"I am authorized to state that MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this opinion."

In the case of *Ray H. Garner et al., Petitioners* v. *Board of Public Works of the City of Los Angeles et al.*,

decided June 4, 1951, by the Supreme Court of the United States, reported in 71 Sup. Ct. 909, the Court said:

"MR. JUSTICE CLARK delivered the opinion of the Court.

"In 1941 the California Legislature amended the Charter of the City of Los Angeles to provide in part as follows:

"'* * * no person shall hold or retain or be eligible for any public office or employment in the service of the City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught, or who may, after this section becomes effective (April 28, 1941), advise, advocate or teach, or who is now or has been within five (5) years prior to the effective date of this section, or who may, after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years, advised, advocated or taught the overthrow by force or violence of the government of the United States of America or of the State of California.

"'In so far as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof.' Calif. Stat., 1941, c. 67.

"Pursuant to the authority thus conferred the City of Los Angeles in 1948 passed ordinance No. 94,004 requiring every person who held an office or position in the service of the city to take an oath prior to January 6, 1949. In relevant part the oath was as follows:

'I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period

beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California * * *'.

The ordinance also required every employee to execute an affidavit 'stating whether or not he is or ever was a member of the Communist Party of the United States of America or of the Communist Political Association, and if he is or was such a member, stating the dates when he became, and the periods during which he was, such a member * * *'

"On the final date for filing of the oath and affidavit petitioners were civil service employees of the City of Los Angeles. Petitioners Pacifico and Schwartz took the oath but refused to execute the affidavit. The remaining fifteen petitioners refused to do both. All were discharged for such cause, after administrative hearing, as of January 6, 1949. In this action they sue for

reinstatement and unpaid salaries. The District Court of Appeal denied relief. 98 Cal. App. 2d 493 (1950). We granted *certiorari*, 340 U. S. 941 (1951).

"Petitioners attack the ordinance as violative of the provision of Art. I, § 10 of the Federal Constitution that "No State shall * * * pass any Bill of Attainder, (or) *ex post facto* Law * * *" They also contend that the ordinance deprives them of freedom of speech and assembly and of the right to petition for redress of grievances.

"Petitioners have assumed that the oath and affidavit provisions of the ordinance present similar constitutional considerations and stand or fall together. We think, however, that separate disposition is indicated.

"2. The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. *Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid.*

"2. In our view the validity of the oath turns upon the nature of the Charter amendment (1941) and the

relation of the ordinance (1948) to this amendment. Immaterial here is any opinion we might have as to the Charter provision insofar as it purported to apply retrospectively for a five-year period prior to its effective date. We assume that under the Federal Constitution the Charter amendment is valid to the extent that it bars from the city's public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyaty to the State and the United States. Cf. *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public workers* v. *Mitchell*, 330 U. S. 75, 102-103 (1947), and a State is not without power to do as much.

"The Charter amendment defined standards of eligibility for employees and specifically denied city employment to those persons who thereafter should not comply with these standards. While the amendment deprived no one of employment with or without trial, yet from its effective date it terminated any privilege to work for the city in the case of persons who thereafter engaged in the activity proscribed.

"The ordinance provided for administrative implementation of the provisions of the Charter amendment. The oath imposed by the ordinance proscribed to employees activity which had been denied them in identical terms and with identical sanctions in the

Charter provision effective in 1941. The five-year period provided by the oath extended back only to 1943.

"The ordinance would be *ex poste facto* if it imposed punishment for past conduct lawful at the time it was engaged in. Passing for the moment the question whether separation of petitioners from their employment must be considered as punishment, the ordinance clearly is not *ex post facto*. The activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over seven years before, and two years prior to the period embraced in the oath. Not the law but the fact was posterior.

"Bills of attainder are 'legislative acts * * * that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial * * *' *United States* v. *Lovett*, 328 U. S. 303, 315 (1946). Punishment is a prerequisite. See concurring opinion in *Lovett* v. *United States*, *supra*, at 318, 324. Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation,' *Cummings* v. *Missouri*, 4 Wall. 277, 320 (1867). We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.

"*Cummings* v. *Missouri*, 4 Wall. 277 (1867), and *Ex parte Garland*, 4 Wall. 333 (1867), the leading cases in this Court applying the federal constitutional prohibitions against bills of attainder, recognized that the guarantees against such legislation have never been intended to preclude legislative definition of standards of qualification for public or professional employment.

Carefully distinguishing an instance of legislative 'infliction of punishment' from the exercise of 'the power of Congress to prescribe qualifications,' the Court said in *Garland's* case: 'The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.' 4 Wall. at 379-380. See also, *Cummings* v. *Missouri, supra,* at 318-319. This doctrine was reaffirmed in *Dent* v. *West Virginia,* 129 U. S. 114 (1889), in which Mr. Justice Field, who had written the *Cummings* and *Garland* opinions, wrote for a unanimous Court upholding a statute elevating standards of qualification to practice medicine. And in *Hawker* v. *New York,* 170 U. S. 189 (1898), the Court upheld a statute forbidding the practice of medicine by any person who had been convicted of a felony. Both *Dent* and *Hawker* distinguished the *Cummings* and *Garland* cases as inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary effect of disqualifying some persons presently engaged in it.

"Petitioners rely heavily upon *Lovett* v. *United States,* 328 U. S. 303 (1946), in which a legislative act effectively separating certain public servants from their positions was held to be a bill of attainder. Unlike the provisions of the Charter and ordinance under which petitioners were removed, the statute in the *Lovitt* case did not declare general and prospectively operative standards of qualification and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees. Under these circumstances, viewed against the legislative background the statute was held to have imposed penalties without judicial trial.

"Nor are we impressed by the contention that the oath denies due process because its negation is not limited to affiliations with organizations known to the employee to be in the proscribed class. We have no reason to suppose that the oath is or will be construed by the City of Los Angeles or by California courts as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or another during the period covered by the ordinance were engaged in proscribed activity but not at the time of affiants affiliation.* We assume that scienter is implicit in each clause of the oath. As the city has done nothing to negative this interpretation, we take for granted that the ordinance will be so read to avoid raising difficult constitutional problems which any other application would present. *Fox* v. *Washington*, 236 U. S. 273, 277 (1915). It appears from correspondence of record between the city and petitioners that although the city welcomed inquiry as to its construction of the oath, the interpretation upon which we have proceeded may not have been explicitly called to the attention of petitioners before their refusal. We assume that if our interpretation of the oath is correct the City of Los Angeles will given those petitioners who heretofore refused to take

*In interpreting local legislation proscribing affiliation with defective organizations the Supreme Court of California has gone beyond the literal text of a statute so as to require knowledge of the character of the organization, as of the time of affiliation, by the person whose affiliation is in question. In **People v. Steelik**, 187 Cal. 361, 203 P. 78 (1921), the Court upheld a conviction under the Criminal Syndicalism Act of 1919 which made one guilty of a felony who "is" a member of any one of a certain class of proscribed organizations. The indictment in relevant part alleged that defendants "are and each of them is" a member of a proscribed organization. The court interpreted the statute as defining and the indictment as charging "the offense of criminal syndicalism, in that he **knowingly** belonged" to a proscribed organization. (Emphasis added).

the oath an opportunity to take it as interpreted and resume their employment.

"The judgment as to Pacifico and Schwartz is affirmed. The judgment as to the remaining petitioners is affirmed on the basis of the interpretation of the ordinance which we have felt justified in assuming (Italics supplied).

"Affirmed."

Proposition III.

Acceptance in the form prescribed shall be obligatory.

Section 2, Enrolled House Bill No. 8 begins: "The oath or affirmation required by this act shall be the following:". Then follows the oath in detail that each public officer or employee must take. The law does not provide that the attorney general may rewrite the oath or affirmation, or that the Supreme Court may rewrite it. The oath stands as it is written and must be subscribed to as written. Neither can it be interpreted to mean other than what it says. The words must be given the usual meaning as defined by any standard dictionary.

Unless the oath or affirmation is subscribed as written the law has not been complied with.

Section 5 of the Act provides:

"No compensation nor reimbursement for expenses shall be paid to any public officer or employee by any public agency unless such officer or employee has taken and subscribed to the oath or affirmation *required by this act*. It shall be the duty of the person certifying to public payrolls to ascertain and certify

that every officer or employee thereon has taken such oath or affirmation."

We cannot conclude that the Legislature intended that any officer or employee of the State can draw compensation or be reimbursed for expenses until such officer or employee has taken and subscribed to *the oath required by this Act.*

Defendants may point out in their brief that a New Jersey case holds that *public officers* cannot be required to take any oath except the one provided in the State Constitution. This was the ruling in *Imbrie* v. *Marsh* (N. J.), 71 Atl. (2d) 352, but such ruling does not apply in this suit because the same court has recently upheld an oath applicable to public school teachers in *Thorp* v. *Board of Trustees,* 79 Atl. (2d) 462, on the ground that a teacher is an employee and not a *public officer.*

Proposition IV.

A teacher is an employee and not a public officer.

In *Hartigan* v. *Board of Regents of West Virginia University* (1901), 49 W. Va. 14, 38 S. E. 698, the Court cited a case in which it had decided "that a teacher is not a public officer" (p. 701), and also said (p. 701):

"But, to return to the line of thought stated above a professor in the university wields no particle of sovereign governmental authority. In a legal view he simply makes a contract with the corporation to teach in the university. In a legal view, what is the difference between a teacher in a public school and a professor in the university? None, except in grade or

eminence of station. Both are teachers in the public educational system."

The cases are summarized in 75 A. L. R. 1352, where the annotator says:

> "The courts are almost unanimous in holding that the position of a teacher is that of employee, resting on the contract of employment, and not that of public officer."

In respect to whether they exercise a part of sovereign power, there is obviously no difference between members of the University faculty and members of the faculties of state colleges or teachers in public schools.

In *Talbott* v. *Public Service Commission* (1942), 291 Ky. 109, 163 S. W. (2d) 33, the Court held that the President and faculty of the University of Kentucky were subject to a five thousand dollar annual salary limitation under a section of the State Constitution, which provided that no "public officer" except the Governor should be paid more than that sum (163 S. W. [2d] 34). This situation was relieved in *Pardue* v. *Miller* (1947), 306 Ky. 910, 206 S. W. (2d) 75, 76, where the Court overruled the prior case on the ground that the faculty members were not public officers but employees.

Proposition V.

Foreign teachers or other nationalists must take the oath as written by the Legislature.

"Nationality" is a term denoting a relationship between an individual and a nation involving the duty of

obedience (or "allegiance") on the part of the subject and protection on the part of the state.

Hackworth International Law Digest, Vol. III, page 553, says:

> "Article II of the inter-American Convention on the status of aliens, signed Feb. 20, 1928, provides:
>
> "'Foreigners are subject as are Nationals to local jurisdiction and laws, due consideration being given to the limitations expressed in conventions and treaties.' 46 Stat. 2754; 4 Treaties (Trenwith 1938) 4723.
>
> "The treaties concluded by the United States with foreign countries assuring certain rights to the Nationals of the contracting parties generally provide that the enjoyment of these rights is subject to their 'submitting themselves to all local laws and regulations duly established'."

In the case of *Home Insurance Company* v. *Dick et al.*, 281 U. S. 397, it is said:

> "* * * The claims here asserted are not based upon the full faith and credit clause * * * They rest upon the Fourteenth Amendment. Its protection extends to aliens."

Title 8, USCA, Sec. 41; provides:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to *the full and equal benefit of all laws* and proceedings for the *security of persons and property* as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and *exactions of every kind*, and to no other."

The case of *United States ex rel. John Turner, Appt.* v. *Williams*, 194 U. S. 279, 48 L. Ed. 979, was a suit for habeas corpus. Relator, an alien, was arrested in New York City by immigration officers, found to be an anarchist, and in the United States in violation of law, and was ordered deported to the country from whence he came. Certain papers were found on Turner, one of them being a list of his proposed series of lectures, the subjects including: "The Legal Murders of 1887", and "The Essentials of Anarchism."

MR. CHIEF JUSTICE FULLER, at page 290, said:

"It is contended that the Act of March 3, 1903, is unconstitutional because in contravention of the 1st, 5th, and 6th Articles of Amendment of the Constitution, and of Sec. 1 of article 3 of that instrument; and because no power is delegated by the Constitution to the general government over alien friends with reference to their admission into the United States or otherwise, or over the beliefs of citizens, denizens, sojourners, or aliens, or over the freedom of speech or of the press.

"Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application" (Citing cases).

At page 294:

"If the word 'anarchists' should be interpreted as including aliens whose *anarchistic views are proposed*

as those of political philosophers, innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few; and, in the light of previous decisions, the Act, even in this aspect, would not be unconstitutional, as applicable to any alien who is opposed to all organized government.

"We are not to be understood as deprecating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty, in itself unconquerable, but this case does not involve those considerations. The flaming brand which guards the realm where no human government is needed still bars the entrance; *and as long as human government endures they cannot be denied the power of self-preservation,* as that question is presented here."

See:

—*William Truax, Sr.* v. *Raich,* 239 U. S. 33.

Since all persons within the United States shall have the same right in every state and territory and are entitled to full and equal benefit of all laws and proceedings, non-citizens of the United States should subscribe to the oath as required by this Act in order to be compensated after May 9, 1951.

In relation to the Attorney General's brief, paragraph 4, page 4 of his opinion is set forth here in detail:

"4. In relation to that part of the oath which requires a public officer or employee to state

> 'that I will support and defend the Constitution of the United States and the Constitution of the State of Oklahoma against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of Oklahoma; * * * that I will take up arms in the defense of the United States in time of War or National Emergency, if necessary.'
>
> the Attorney General is of the opinion that since no exception was made in the act as to a *public employee* (public officers must be citizens) who is not an American citizen, but who is lawfully in the United States, said employee is required by the act to take the oath as prescribed therein. However, we do not believe it would be improper for him to, in substance, state in writing on the sheet containing his oath, at the bottom thereof,
>
> "'I am not a citizen of the United States'."

We agree that every public employee must subscribe to the oath as required by law, but desire to set forth our reasons herein.

In Hackworth Digest of International Law, Vol. III, paragraph 282, page 601, it is said:

> "It is a universally accepted rule of international law that a person voluntarily entering the military services of a foreign government owes that government temporary allegiance and must look to it for protection. In thus accepting service in the armed forces of a foreign state, he cannot look for protection to his own government against the legitimate consequences of his conduct. Assistant Secretary Messersmith to Phil Bard, October 28, 1937, MS Department of State, file 852.2221 Freed Edwards 15."

Again at pages 611-612 of Hackworth, Vol. III:

"On August 1st, 1917 the Senate of the United States passed a resolution requesting the President to propose to all European nations engaged in the war against the Central Powers of Europe an agreement, 'authorizing and empowering the United States to apply the provisions of the Act entitled "An Act to authorize the President to increase temporarily the military establishment of the United States," approved May 18, 1917, to all such subjects and citizens domiciled in this country in the same manner and to the same effect as such provisions are applied to the citizens of the United States in selecting and raising an army or navy for service in the present war.' Cong. Rec., Vol. 55, pt. 6, p. 5667; 1918 For. Rel. Supp. 2, p. 648.

"Conventions were concluded with the following countries providing for the reciprocal military service of the citizens or subjects of the respective countries in the territory of the other, subject to certain provisions with respect to exemption; Canada, June 3, 1918, 40 Stat. 1624; 3 Treaties, etc. (Redmond, 1923) 2654; 1918 For. Rel., Supp. 2, p. 714; France, Sept 3, 1918, 40 Stat. 1629; 3 Treaties, etc. (Redmond, 1923) 2592; 1918 For. Rel., Supp. 2, p. 723, Great Britain, June 3, 1918, 40 Stat. 1620; 3 Treaties, etc. (Redmond, 1923) 2650; 1918 For. Rel., Supp. 2, p. 708; Greece, Aug. 30, 1917, 40 Stat. 1637; 3 Treaties, etc. (Redmond, 1923) 2663; 1918 For. Rel., Supp. 2, p. 729. Italy, Aug. 24, 1918, 40 Stat. 1633; 3 Treaties, etc. (Redmond, 1923) 2708; 1918 For. Rel., Supp. 2, p. 726. For correspondence relative to the negotiation of these conventions, see 1918 For. Rel., Supp. 2, pp 648-732."

The Selective Training and Service Act of Sept. 16, 1940, 54 Stat. 885, provides in Section 3:

"Except as otherwise provided in this Act, every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land and naval forces of the United States.

"For executive order 8545 of Sept. 23, 1940 prescribing Selective Service regulations under the act, see 5 F. R. 3779, 3923 (Sept. 25 and Oct. 8, 1940).

"For an interpretative ruling upon the meaning of the words 'male alien' residing in the United States under section 2 of the Selective Training and Service Act of 1940, see the opinion of the Attorney General dated Oct. 11, 1940 (39 Op. Att. Gen., No. 139).

"Section 3 of the act of 1940 was amended by an act approved Dec. 20, 1941, which makes all male persons between the ages of 20 and 45, residing in the United States liable for training and service in the land or naval forces. Nationals of neutral countries may apply prior to induction into the service for exemption as aliens, but such application has the effect of thereafter debarring the applicant from becoming a citizen of the United States. A further proviso prohibits the induction of persons declared by the President to be alien enemies, unless they are acceptable to the land or naval forces. Public 360, 77th Cong., 1st Sess. See also S. Rep. 394, 77th Cong., 1st Sess."

What do the words *"that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary"* mean? What did the Legislature have in mind when these words were written? Can the words mean other than bear arms if and when called upon to do so by the President as Commander-in-Chief, or agency

of the Government, vested with the power to call upon them to go into military service? This power is vested in the President by Congress by virture of Title 50, USCA, 310.

Title 50, USCA App., Sec. 303.

"(a) Except as otherwise provided in this Act (sections 301-303, 304, 305, 306-309, 310, 311-318 of this Appendix), every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 2 of this Act (302 of this Appendix), shall be liable for training and service in the land or naval forces of the United States: Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act (section 301-303, 304, 305, 306-309, 310, 311-318 of this Appendix) if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: Provided, further, That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act (section 301-303, 304, 305, 306-309, 310, 311-318 of this Appendix) unless he is acceptable to the land or naval forces."

If, by reason of a treaty agreement with another country, a national of that country could not be called

upon to bear arms for the United States, then by operation of that agreement the military authorities would say it is not necessary for that national to bear arms.

For example: A woman teacher, a British subject, holds a contract to teach physics at Oklahoma A. & M. College, at Stillwater, and signs the oath as written: *"that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary."* An emergency arises and a war is declared against Russia. Congress passes a draft law and selective service starts calling men and women into service. At the time of the emergency the United States has a treaty agreement with Britain excluding her nationals from military service in American forces. Under the draft law written by the Congress, construed in conjunction with our treaty agreement, the visiting teacher would not be compelled to bear arms. Yet she has fully complied with the proviso in the oath law: *"That I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary."*

It is not necessary that she bear arms because of the treaty agreement.

Now let us apply this section of the oath to a native-born citizen with religious beliefs against war. What do the words in their application to him mean?

For example: An associate chemistry professor, genius, age 22 belongs to a religious faith opposed to war. War is declared against Russia and he is drafted. When he fills out his draft questionnaire he tells of his faith and,

when drafted, is then assigned by the military authorities to non-combatant duty, or where the military authorities wish to place him.

Under those circumstances could the chemistry professor sign that part of the oath as written: *"That I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary."*

Certainly, because in the final analysis Congress determines the ages and the classes called into military service and *"if it is necessary for a person to bear arms."*

All branches of our armed forces provide special duties for persons holding religious scruples against bearing arms.

As a matter of fact *any* person signing the oath *"to bear arms, if necessary"* is not affirming to do anything he will not have to do in any case if war comes. No rights are lost nor none gained insofar as bearing arms is concerned. 50 USCA 310.

Proposition VI.

The oath law does not constitute an unlawful delegation of legislative power of the State of Oklahoma to the Government of the United States and to an executive office thereof.

At page 25, brief of the Board of Regents, under their Proposition 5, the question is raised as to the interpretation of the following words:

> "Which *has been officially determined* by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive orgainzation" (Italics supplied).

It simply means what it says and what the lower court found it to mean. Any organization that prior to the passage of the law by the Legislature, to-wit: April 9, 1951, *"which has been officially determined* * * * a communist front or subversive organization." Certainly the Legislature did not intend to say and did not say "any organization determined after the passage of this Act to be subversive by the Attorney General of the United States." To give it the simple meaning of what the words mean makes the proviso constitutional in all things as pointed out in Board of Regents brief, page 28, which is supported by the general rule which appears in 16 C. J. S. (1939), page 343, Section 133b, because here the Legislature did not delegate future authority to the Attorney General of the United States or other authorized agency. The statute is valid because it adopts existing lists of the Attorney General or other authorized agencies by reference by using the words, *"which has been officially determined"* prior to April 9th, the effective date of the Act. There is a well known principal of law that needs no citations of authority. Even if the interpretation could be given the Act as contended by the Board, which we specifically and categorically deny, or could be given an interpretation which would make the Act invalid or give it a meaning to make it valid, the Court would give it the interpretation that would validate it.

It is difficult to conceive of language more plainly indicating the intention of the Legislature.

In the case of *Nervo* v. *Mealey*, 25 N. Y. S. (2d) 632, 175 Misc. 952, in construing the words "has been", the Court held:

> "The use of the words 'has been' or some other expression denoting past time in a statute, is construed as retrospective when constitutional difficulties do not forbid."

There is no uncertainty as to the meaning of the Legislature and the fact that when the Legislature meets again it will again have to re-enact the loyalty oath in order to have included the organizations determined to be subversive between April 9, 1951 and April 9, 1953 (or any other date of the passage of a new oath law) and must be subsequently enacted at each session of the Legislature in order to include new lists determined in the meantime is a matter for the Legislature. We have no doubt that each succeeding Legislature will be vitally concerned with keeping subversive persons from the State pay rolls and will promptly enact such measure.

In the case of *Joint Anti-Fascist Refugee Committee, Petitioner,* v. *J. Howard McGrath, Attorney General of the United States et al.* (decided by the Supreme Court of the United States April 30, 1951) in an opinion announced by MR. JUSTICE BURTON, the Court held that the Attorney General must give a hearing to an organization before listing it as communistic. This action involved executive order No. 9835, the President's Loyalty Order.

> "Nothing we have said purports to adjudicate the truth of the petitioners' allegations that they are not in fact communistic. We have assumed that the des-

ignations made by the Attorney General are arbitrary because we are compelled to make that assumption by his motions to dismiss the complaints. Whether the complaining organizations are in fact communistic or whether the Attorney General possesses information from which he could reasonably find them to be so must await the determination by the District Court upon remand.

"For these reasons, we find it necessary to reverse the judgments of the Court of Appeals in the respective cases and to remand each case to the District Court with instructions to deny to respondents motion that the complaint be dismissed for failure to state a claim upon which relief can be granted."

They object, not to a particular erroneous action of a valid power, but to the validity of the regulation authorizing the action.

MR. JUSTICE FRANKFURTER, in his opinion, said:

"'"Fairness of procedure" is due process in the primary sense.' *Brinkerhoff Faris Co.* v. *Hill*, 281 U. S. 673, 681.

"It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. 'This Court has never held, nor must now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without op-

portunity, at some time to be heard * * *' *The Japanese Immigrant Case*, 189 U. S. 86, 100-101.

"The high social and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances in which we have sustained executive action even though it did not observe the customary standard of procedural fairness. It is in these instances that constitutional compulsion regarding fair procedure was directly the issue. Thus it has been held that the constitution cannot be invoked to prevent Congress from authorizing disbursements on the *ex parte* determination of an administrative officer that prescribed conditions are met. *U. S.* v. *Babcock*, 250 U. S. 328, *United States ex rel Dunlap* v. *Black*, 128 U. S. 40. The importation of goods is likewise a privilege, which is Congress clearly so directs, may likewise be conditioned on *ex parte* findings. *Butterfield* v. *Stranahan*, 192 U. S. 370, *Hilton* v. *Merritt*, 110 U. S. 97. * * * Again, when decisions of administrative officers in execution of legislation turns exclusively on considerations similar to those on which the legislative body could itself have acted summarily, notice and hearing may not be commanded by the Constitution. *Bi-metalic Co.* v. *Colorado*, 239 U. S. 441.

"* * * Nothing in the Loyalty Order requires him (attorney general) to deny organizations opportunity to present their case. The Executive Order, defining his powers, directs only that designation shall be made 'after appropriate investigation and determination.' This surely does not preclude an administrative procedure, however informal, which would incorporate the essentials of due process. Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case

against them and to permit them to meet it if they can. Indeed, such a contention could hardly be made inasmuch as the loyalty order itself requires partial disclosure and hearing in proceedings against a government employee who is a member of a proscribed organization."

MR. JUSTICE DOUGLAS reaffirms the rule of law stated throughout this brief:

"Of course, no one has a constitutional right to a government job."

In keeping with the ruling in *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* the words "*which has been officially determined*" mean those organizations determined to be subversive after being given a hearing by the Attorney General of the United States or other authorized agency.

Proposition VII.

Requiring one to swear that he has not belonged to the named organizations for the preceding five years is not *ex post facto.*

This law cannot be *ex post facto* unless it imposes *punishment* for past conduct at the time it was engaged in. *Garner* v. *Los Angeles, supra:*

"We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

Since the statute under attack *does not* impose punishment, but merely sets forth the standards of qualification

and requirements of eligibility to hold public office or a position of public trust or to draw public funds, it cannot possibly be an *ex post facto* law, even though past conduct may be the standard of qualification for public office.

The Court further said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

The Board of Regents and Intervenors cannot successfully argue that since perjury is a crime and the intervenors are required to swear that they have not been members of a communist organization for the past five years that such proviso is *ex post facto* in that it imposes punishment for past conduct. This argument has no merit and it is apparent from the reading of the law that the punishment of imprisonment is imposed only for a present act, to-wit, swearing falsely and knowingly as regards a past fact. The act for which the punishment is imposed is unlawful when committed; thus the essential element of an *ex post facto* law is lacking.

In the case of *Skinner* v. *State ex rel. Williams*, 189 Okla. 235, 115 Pac. (2d) 123, the Court said, in an attack upon the Habitual Criminal Sterilization Act alleging the same to be cruel and unusual punishment and an *ex post*

facto law, that such act is not a bill of attainder nor an *ex post facto* law, and is not violative of Section 15, Article 2 of the Oklahoma Constitution and Section 10, Article 1 of the Federal Constitution, and further said *these constitutional inhibitions have reference only to punishment for crime* (Authorities cited). These contentions are, therefore, upon the premise that the act in question is a penal law, and that sterilization is inflicted as punishment * * *. The objections now being urged are not applicable where the operation * * * is required as a eugenic measure and not as a punishment. Since the law does not punish it is not *ex post facto*, bill of attainder or cruel or unusual punishment.

The Oklahoma Supreme Court recognizes that the element of punishment is an essential element of *ex post facto* law and bill of attainder. Here the element of punishment is lacking. There is no merit to the argument that the measure under attack is *ex post facto* or a bill of attainder.

Proposition VIII.

The Oklahoma Agricultural College is a function of the State Government and its employees are employees of the State and must take the oath.

Sec. 1. "Every officer and every employee of the State, * * * public agency, public authority * * * shall take and subscribe to the oath or affirmation required by this Act."

Sec. 3. "The oath or affirmation required by this Act shall * * * be filed by the person executing it

with the * * * Board * * * institution in or for which such person is employed or appointed."

Sec. 5. "No compensation or reimbursement for expenses incurred shall be paid to any public officer or employee of any public agency unless such officer or employee has taken and subscribed to the oath or affirmation required by this Act."

In *Connell* v. *Gray*, 33 Okla. 591, 122 Pac. 417, the Court said:

"The board of regents of the Agricultural and Mechanical colleges of this state have authority, *where not prohibited, either expressly or impliedly, by law,* to collect incidental fee to bear expenses necessary and convenient to accomplish the objects for which the institution was founded.

"Under that rule we are not required to look for grant of power * * * but for limitation of power, * * *. Our attention has been called to no legislative enactment prohibiting the Board of Regents * * * from requiring the payment of fees, other than tuition as a condition precedent to admission to the university and we know of none" (Italics supplied).

The Oklahoma Agricultural Colleges are established by the State of Oklahoma.

In the case of *Hamilton* v. *Regents of the University of California* (1934), the Supreme Court of the United States, 293 U. S. 245, declared:

"* * * by the California Constitution the regents are, with exceptions not material here, fully empowered in respect of the organization and govern-

ment of the University which, as it has been held, is a constitutional department *or function of the state government.*"

And, again at pp. 257-258:

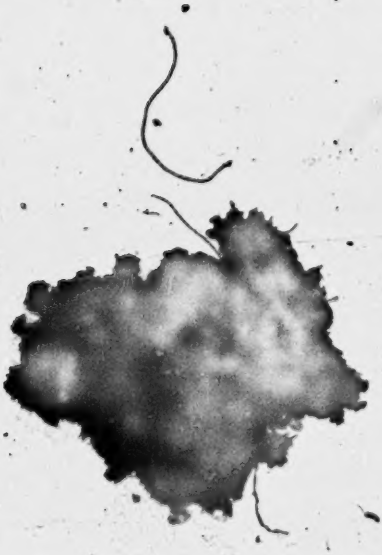
"* * * The meaning of 'statute in any state' in (Sec. 237[a] Judicial Code, 28 U. S. C. A., page 344[a]) is not limited to acts of State Legislatures. It is used to include every act legislative in character to which the state gives sanction, no distinction being made between acts of the state legislature and other exertions of the state lawmaking power."

The statute provides that every employee of the State must take the oath. This means every person in the employ of the State and paid a salary from State funds must take and subscribed to the oath. No distinction is made in the Act between an employee of a municipal subdivision, county, or school district, or other subdivision, authority, or agency, of the State. Nor can a distinction be made because the employees are under the supervision and control of a Board of Regents, an agency and authority created by the State.

Proposition IX.

The Act is constitutional under the provisions of Article 5, Section 57 of the Oklahoma Constitution.

The title is sufficient. Suffice it to say that the decided trend of the best considered cases is to so construe this provision of the Constitution as not to put unreasonable restraints upon the power of legislation and thus unnecessarily embarrass the Legislature in its work. *State*



ex rel. Reed, Insurance Commissioner v. *Midwest Mutual Burial Ass'n, Inc.*, 176 Okla. 468, 56 Pac. (2d) 124; *Cooper* v. *King*, 171 Okla. 121, 42 Pac (2d) 249; *Chicago, R. I. & P. R. Co.* v. *Excise Board of Stephens County*, 168 Okla. 519, 34 Pac. (2d) 274; *State ex rel. Ledbetter, Sheriff* v. *Pitts, County Treasurer*, 137 Okla. 59, 277 Pac. 918; *Bond et al.* v. *Phelps et al.*, 200 Okla. 70, 191 Pac. (2d) 938; *National Mutual Casualty Company et al.* v. *Briscoe*, 188 Okla. 440, 109 Pac. (2d) 1088.

Proposition X.

Intervenors willfully failed to take oath.

The trial court concluded, in Conclusion No. 6, that the intervenors, and each of them, did not take and subscribe to the oath as provided in Section 2 of the Act and willfully failed and refused to take the oath, and by reason of said willfull failure the Board of Regents was enjoined from paying them and their employment was terminated. None of the intervenors proved in the court below that they had made an honest mistake in failing to subscribe to the oath within the time prescribed in the Act. Nor did they seek permission from the trial court to be permitted to file the oath as prescribed by the statute, nor did they attempt to show an honest mistake.

We are of the opinion that by failure of the intervenors to prove, during the trial of the case below, that an honest mistake had been made that they cannot now raise the question for the first time in this appeal.

CONCLUSION

We conclude for the reasons discussed hereinbefore in our brief that the propositions raised by the Attorney General should be answered by the Court as follows:

Proposition 1. If earned prior to April 9, 1951, can be paid without taking oath.

Proposition 2. Act does not apply to persons who are employed to perform services not of continuous nature extending over a thirty-day period or more.

Proposition 3. Must subscribe to the Oath in the exact form set forth in Section 2.

Proposition 4. All citizens and non-citizens must subscribe to the oath as written.

Proposition 5. Each employee must swear that he has not been affiliated with, during the preceding five years, or a member of an organization officially determined to be a Communist Front or subversive organization.

Proposition 6. A person holding contract for a fixed period must subscribe to the Oath as written.

Proposition 7. Any public officer or employee of the State whose expenses and compensation are payable from other than State funds, or who serve without pay, must take the oath.

Proposition 8. The automatic forfeiture of office and employment provision of Section 1 are valid.

Proposition 9. Provision of the Act requiring the Oath to be taken within a thirty-day period are mandatory.

Proposition 10. A precinct election official who fails to take the oath within the thirty-day period automatically

forfeits his office and right, after expiration of said period, to be paid compensation and expenses earned and incurred by him.

Proposition 11. Act does specifically repeal existing loyalty oath law.

Proposition 12. Act does not violate Section 15, Article 2 of the State Constitution or Section 10, Article 1 of the Federal Constitution.

Provision 13. Provisions of the Act are applicable to employees of State institutions of higher education including those under control of the Board of Regents.

We join with the Attorney General in asking the Court to decide in the case before it all of the issues raised herein by all the briefs in order to avoid a multiplicity of appeals in the future. Above all we believe that it is absolutely necessary for this Court to make findings and conclusions as did the trial court and explain what the various provisions of the oath means. We agree with the findings of the trial court and believe them to be the correct interpretation of what the Legislature had in mind when this law was passed.

We conclude that Enrolled House Bill No. 8, passed by the Twenty-third Legislature, provides for the taking of an oath as a condition of employment and there is no issue involving the freedom of religion, thought or speech.

Respectfully submitted,

PAUL W. UPDEGRAFF,
Attorney for Defendant in Error.

August, 1951.

APPENDIX

APPENDIX I.

EXTRACTS FROM THE INTERNAL SECURITY ACT OF 1950*

CHAPTER 1024 — PUBLIC LAW 831
(H. R. 9490)

An Act to protect the United States against certain un-American and subversive activities by requiring registration of communist organizations, and for other purposes.

Be is enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That: This Act may be cited as the "Internal Security Act of 1950".

Title I—Subversive Activities Control

Section 1. (a) This title may be cited as the "Subversive Activities Control Act of 1950."

(b) Nothing in this Act shall be construed to authorize, require or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.

Necessity for Legislation

Sec. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which in its origin, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (govern-

*Reprinted U. S. Code Congressional Service, 1950, No. 10, p. 3740.

mental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout of the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the

objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts."

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attachés of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semidiplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments, the Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

* * * * * * * *

Employment of Members of Communist Organizations

Section 5(a) When a Communist orgainzation, as defined in paragraph (5) section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.*

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*The prohibition against employment of members of Communist organizations is only one of many provisions along similar lines. Section 4 prohibits certain specified actions. Section 6 provides for denial of passports to members of Communist organizations. Section 7 provides for registration and annual reports of Communist organizations. Section 8 provides for registration of members of Communist-action organizations. Section 9 requires the Attorney General to keep a register of Communist organizations and to make reports to Congress and the President. Section 10 deals with denial of the use of the mails and instrumentalities of interstate and foreign commerce, and Section 11 to denial of tax deductions and exemptions for contributions to any organization subject to the Act. Section 12 establishes the Subversive Activities Control Board. Section 13 provides for proceedings before the Board and Section 14 for judicial review thereof. Section 15 provides penalties, which by Section 17 are in addition to and not in modification of existing criminal statutes. By Section 16 the Administrative Procedure Act is made applicable. Sections 18 to 31 amend a number of statutes, including the immigration laws and Alien Registration Act to bring them into conformity with the Internal Security Act.

APPENDIX II.

EXTRACTS FROM HOUSE REPORT NO. 2980 RECOMMENDING PASSAGE OF THE INTERNAL SECURITY ACT OF 1950*

Necessity for Legislation

The need for legislation to control Communist activities in the United States cannot be questioned.

Over 10 years of investigation by the Committee on Un-American Activities and by its predecessor committee has established (1) that the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

The Communist program of conquest through treachery, deceit, infiltration, espionage, sabotage, corruption, and terrorism has been carried out in country after country and is an ever-growing threat to the national security of this and other countries. There is ample evidence that one of the primary objectives of the world Communist movement, directed from within the most powerful existing Communist totalitarian dictatorship, is to repeat this pattern in the United States.

There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist

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*Reprinted U. S. Code Congressional Service, 1950, No. 10, p. 4160.

movement, in its ruthless and tireless endeavor to advance the world march of communism.

The findings which support these conclusions, and the vast quantity of evidence on which they are based, are set forth in detail in the numerous reports which this committee and its predecessors have printed and circulated. Corroboration has been supplied by independent and exhaustive research by other committees of Congress.

Concern over this threat is not limited to the legislative branch of our Government. At the present time 30 of the 70 major countries in the world have outlawed the Communist Party. Many other countries have adopted various legislative decrees against communism, and since 1947 the trend has been toward declaring all Communist activities illegal. Panama was the latest to take such action. This action came in April of this year. The countries which have outlawed the Communist Party are as follows: Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, Panama, Haiti, Dominican Republic, Peru, Brazil, Bolivia, Paraguay, Chile, Portugal, Spain, Greece, Lebanon, Egypt, Syria, Iran, Transjordan, Saudi Arabia, Anglo Egyptian Sudan, West Bengal, Hyderabad, Madras, Burma, Siam, Malaya, South Korea, Formosa, and Malaya.

Concern over the Communist threat has not been overlooked by the different State legislatures. At the present time 33 States have laws against the displaying of the "Red" flag; 12 states have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; 16 have laws against the Communist Party candidates appearing on the election ballot; 19 states exclude Communists from public employment; 28 States require loyalty oaths of all employees; and 20 States require teachers to take loyalty oaths.

APPENDIX III.

California Statute Requiring Loyalty Oath From Civil Defense Workers and Public Employees*

Section 1. Chapter 8 is added to Division 4, Title 1 of the Government Code, to read:

CHAPTER 8. Oath or Affirmation of Allegience for Civil Defense Workers and Public Employees

3100. It is hereby declared that the defense of the civil population during the present state of world affairs is of paramount state importance requiring the undivided attention and best efforts of our citizens. In furtherance of such defense and in the exercise of police power of the State in protection of its citizens, all public employees are hereby declared to be civil defense workers subject to such civilian defense activities as may be assigned to them by their superiors or by law.

3101. For the purpose of this chapter the term "civil defense worker" includes all public employees and all volunteers in any civilian defense organization accredited by the State Disaster Council. The term "public employees" includes all persons employed by the State or any county, city, city and county, state agency or public district, excluding aliens legally employed.

3102. Subject to the provisions of Section 3 of Article XX of the Constitution, all civil defense workers shall within the first 30 days of employment take and subscribe to the oath or affirmation required by this chapter.

3103. The oath or affirmation required by this chapter is as follows:

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitu-

*Cal. Stats. Ex. Sess. 1950, c. 7, approved October 3, 1950.

tion of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

(If no affiliations, write in the words 'No Exceptions') and that during such time as I am a member or employee of the .....

(name of public agency)

I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."

3104. The oath or affirmation may be taken before any officer authorized to administer oaths.

No fee shall be charged by any person before whom the oath or affirmation is taken and subscribed.

3105. The oath or affirmation of any civil defense worker of the State shall be filed with the State Personnel Board within 30 days of the date on which it is taken and subscribed.

The oath or affirmation of any civil defense worker of any county shall be filed in the office of the county clerk of the county.

The oath or affirmation of any civil defense worker of any city shall be filed in the office of the city clerk of the city.

The oath or affirmation of any civil defense worker of any other agency or district shall be filed with such officer or employee of the agency or district as may be designated by such agency or district.

3106. Compliance with this chapter shall, as to state employees, be deemed full compliance with Chapter 4, Part 1, Division 5, Title 2 of this code, requiring taking of oaths by state employees.

3107. No compensation nor reimbursement for expenses incurred shall be paid to any civil defense worker by any public agency unless such civil defense worker has taken and subscribed to the oath or affirmation required by this chapter. It shall be the duty of the person certifying to public payrolls to ascertain and certify that such civil defense worker has taken such oath or affirmation.

3108. Every person who, while taking and subscribing to the oath or affirmation required by this chapter, states as true any material matter which he knows to be false, is guilty of perjury, and is punishable by imprisonment in the state prison not less than one nor more than 14 years.

3109. Every person having taken and subscribed to the oath or affirmation required by this chapter, who while in the employ of, or service with, the State or any county, city, city and county, state agency, public district, or

civilian defense organization advocates or becomes a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States by force or violence or other unlawful means, is guilty of a felony, and is punishable by imprisonment in the state prison not less than one or more than 14 years.

Sec. 2. Subject to the provisions of Section 3 of Article XX of the Constitution, all persons designated in Chapter 8, Division 4, Title 1, of the Government Code as civil defense workers, on the effective date of this act shall, within 30 days, take and subscribe to the oath or affirmation required by Chapter 8, Division 4, Title 1, of the Government Code. Any public employee who is on authorized leave on the thirtieth day after the effective date of this act shall take and subscribe said oath or affirmation within 30 days of his return to work.

Sec. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Sec. 4. This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

During the present emergency in world affairs loyalty and allegiance to the United States and the principles for which it stands are of utmost importance. Immediate assurance that persons in civil defense are loyal to this government and are not in fact advocates of its overthrow by force or violence is essential to the well-being of the State and Nation and the confidence of the people. It is therefore necessary that this act take effect immediately.

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In The
Supreme Court of the United States

OCTOBER TERM, 1952

No. 14

ROBERT M. WIEMAN *et al.*,

Appellants,

VERSUS

PAUL W. UPDEGRAFF *et al.*,

Appellees.

BRIEF OF APPELLEES, THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA

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OCTOBER, 1952.

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Section 10, Article 1 of the Constitution of the United States. This being true it would likewise appear, *under the principles of law announced in the Garner case, supra*, that inasmuch as it has been unlawful since 1941 for a public officer (not an employee) of this State to be affiliated with one or more of the designated organizations referred to in Section 31, or to advocate, etc., the doctrines enumerated in said section, the provisions of the instant Act, *insofar as same relate to like affiliations or doctrines of such officers during the past five years*, are not invalid under the above constitutional provisions.

"Before concluding our reference herein to the decision in the *Garner case*, attention is called to the fact that the ordinance there involved did not provide (as does the instant Act) for an *automatic forfeiture* of position and compensation for failure to take the oath, since said decision recites that the employees involved in said case

> 'were discharged for such cause after administrative hearing, * * *.'

"*Under the Act involved in this appeal each public officer and employee of Oklahoma is under the burden of making his own decision as to whether he can honorably take the oath in order to prevent his position and compensation from being automatically forfeited.* Therefore, that part of the decision of the *Garner case* which states

> 'We have no reason to suppose that the oath *is or will be construed by the City of Los Angeles* or by California courts as affecting adversely those persons who during their affiliations with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or

another during the period covered by the ordinance were engaged in proscribed activity but not at the time of affiant's affiliation. We assume that scienter is implicit in each clause of the oath. As the city has done nothing to negative this interpretation, *we take for granted that the ordinance will be so read to avoid raising difficult constitutional problems which any other application would present.* Fox v. Washington, 236 U.S. 273, 277 (1915). It appears from correspondence of record between the city and petitioners that although the city welcomed inquiry as to its construction of the oath, *the interpretation upon which we have proceeded may not have been explicitly called to the attention of petitioners before their refusal.* We assume that if our interpretation of the oath is correct the City of Los Angeles *will give those petitioners who heretofore refused to take the oath,* an opportunity to take it as interpreted and resume their employment.',

is not applicable to the instant proposition, since there is no *administrative body* created or authorized by House Bill No. 8:

(1) to give an Oklahoma officer or employee an 'administrative hearing,'

(2) to advise him as to his oath obligation and/or

(3) to give an officer or employee who fails to timely take the oath 'an opportunity to take it *as interpreted* and resume his employment.'

* * * * *

"It will be noted that the *Garner case, supra,* cites with approval the decisions of the United States Supreme Court in the *Lovett* and *Cummings cases.*

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In The
Supreme Court of the United States

OCTOBER TERM, 1952

No. 14

ROBERT M. WIEMAN; NANCY KENT ZIEBUR; WERNER C. BAUM; SAMUEL HUNT LEE, JR.; MALCOLM CORRELL; LILLIAN A. SCHMOE, and LUELLA NIETZ,

Appellants,

VERSUS

PAUL W. UPDEGRAFF; THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, State Treasurer of the State of Oklahoma, and WILBURN C. CARTWRIGHT, State Auditor of the State of Oklahoma,

Appellees.

BRIEF OF APPELLEES, THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA

STATEMENT OF CASE

The material allegations of fact set forth in the "Statement of the Case" on pages 9 to 21 of appellants'

brief, also in the preceding subheads of said brief entitled "Opinion Below," "Jurisdiction," and "Statutes Involved," are substantially correct, with the exception it is not stated that in response to the "Cross-Petition of Intervenors" (R. 32, 33), referred to on page 12 of appellants' brief (asking for a writ of mandamus or an order of mandatory injunction directing The Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, *hereinafter referred to as The Board of Regents, et al.*, to "certify, approve and pay" intervenors' salaries up to and including June 30, 1951), said The Board of Regents, *et al.*, filed their "Answer to Cross-Petition of Intervenors" (R. 35, 36), in effect alleging that the issuance of such a writ or order was neither necessary nor authorized since it was their intention to "certify, approve and pay" said salaries "unless enjoined" from doing so by the trial court.

Before concluding this statement, the appellees, The Board of Regents, *et al.*, desire to state that *the reason they did not appeal to this Court* the decision (R. 59-69) of the Supreme Court of Oklahoma herein (wherein certain holdings are made *adverse* to the position urged by The Board of Regents, *et al.*, both before the trial court and on appeal before the Supreme Court of Oklahoma), is that *it has been the policy of the Attorney*

General for many years to not appeal decisions of the Supreme Court of Oklahoma in cases which said office had appealed from trial courts to said court, even though he did not agree therewith.

However, since the appellants herein (intervenors in the trial court) have appealed the instant decision of the Supreme Court of Oklahoma to this Court, *made The Board of Regents, et al., appellees therein and served copies of the record and their brief thereon.* said appellees, under the duty to file an answer brief imposed thereon by Paragraph 4, Rule 27 of this Court and since our view as to the essential legal conclusions reached in appellants' brief is not in conflict therewith, file this brief wherein we quote for the information of the Court, *without further comment or argument*, applicable excerpts from the said brief of The Board of Regents, *et al.*, in the Supreme Court of Oklahoma, revealing the view we expressed in said court (same being in accord with our present view) *as to the issues that are now pending herein before this Court.*

Inasmuch as in certain of said "applicable excerpts" reference is made to an opinion of the Attorney General of Oklahoma, we deem it necessary to inform the Court that shortly after April 9, 1951, the effective date of House Bill No. 8 (the act involved here), the Attorney General of Oklahoma, at the written request of the Honorable Johnston Murray, Governor of Oklahoma,

addressed an opinion to the Governor in which he gave his opinion *in eleven numbered propositions*, as to all questions theretofore submitted to him as to the meaning and constitutional application of said act. It is to said opinion that said applicable excerpts refer.

ARGUMENT AND AUTHORITIES

Appellants in their brief in this Court set forth argument (Br. 44-108) in support of their instant appeal under what are designated as "Point I", "Point II", "Point III", "Point IV", "Point V" and "Point VI". Said points will be quoted and answered in this brief in the manner heretofore outlined.

ANSWER TO APPELLANTS' POINT I

Appellants' Point I (Br. 44-55) is set forth on page 44 of their brief as follows:

> "The Act inflicting punishment of forfeiture of contract and denial of compensation without judicial trial, is a bill of attainder, in violation of Article 1, Section 10 of the Constitution of the United States providing that no State shall pass a bill of attainder."

Said point is discussed in "Proposition 12" (pp. 48-59) of the brief of The Board of Regents, *et al.*, in the Supreme Court of Oklahoma, as follows:

> "Do provisions of Act violate that part of Section 15, Article 2 of our State Constitution, and Section 10, Article 1 of the Fed-

eral Constitution, which provide that no 'bill of attainder' or *'ex post facto* law' shall ever be passed?

"The above proposition is not discussed in the Attorney General's opinion. Plaintiff, however, at the trial took the position that said proposition should be answered in the negative, although many citizens of the State, *including intervenors*, take a *contra* view. In this connection attention is called to that part of the oath which requires each public officer or employee, *in order to prevent his office or employment and resulting compensation and expenses from being automatically forfeited*, to swear within the pertinent thirty-day period set forth in the Act

> 'that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member * * * of any agency, party, organization, association, or group whatever *which has been* officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization.'

"It will be here noted * * * that under the above provisions of the Act if a citizen of this State who (for example) was holding a public office or employment on April 9, 1951 (the effective date of the Act), had at any time within five years *prior to said date* been a member of any organization which had been officially determined by the United States Attorney General to be a 'Communist Front or Subversive Organization,' *even though said citizen had not only ceased to be such a member long prior to said determination but had openly renounced and denounced the same*, said citizen would be unable to properly take said oath within thirty days after April 9, 1951, *supra*, and hence at the expiration of said period would not only *automatically forfeit* his

office or employment but his right to receive compensation and expenses thereafter. The same will be true as to all officers or employees elected or appointed after said date.

"It, therefore, appears that the Act (except as hereinafter noted in our discussion of the *Garner case)* is violative of that part of Section 15, Article 2 of our State Constitution, and Section 10, Article 1 of the Federal Constitution, which provides that no 'bill of attainder' or '*ex post facto* law' shall ever be passed. In this connection attention is called to the case of *American Communications Association* v. *Douds*, 339 U.S. 382, 94 L. ed. 925, wherein the United States Supreme Court, at page 952 of said Law Edition citation, held as follows:

> 'The unions' argument as to bill of attainder cites the familiar cases, *United States* v. *Lovett*, 328 U.S. 303, 90 L. ed. 1252, 66 S. Ct. 1073 (1946): *Ex parte Garland* (U.S.), 4 Wall. 333, 18 L. ed. 366 (1866): *Cummings* v. *Missouri* (U. S.), 4 Wall. 277, 18 L. ed. 356 (1866). Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. *But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for past actions;* whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into future conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be: but that does not alter the conclusion that § 9 (h) is intended to prevent future action rather than to punish past action.

> 'This distinction is emphasized by the fact that members of those groups identified in § 9 (h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in § 9 (h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See United States v. Lovett, supra (328 U.S. at p. 314, 90 L. ed. 1258, 66 S. Ct. 1073); Cummings v. Missouri, supra (U.S.), 4 Wall. at p. 287, 18 L. ed. 356. Here the intention is to forestall future dangerous Acts; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder.'

"The above decision supports defendants' position here, since the instant Act clearly negatives the right of a public officer or employee who had been, within the preceding five years,

> 'a member of any agency, * * * which has been officially determined by the United States Attorney General, or other authorized public agency of the United States to be a communist front or subversive organization.',

to properly take the oath, even though he was no longer a member thereof.

"The principles of law announced in said decision, as defendants interpret same, are not departed from

by the Supreme Court of the United States in the recent case of *Garner et al.* v. *Board of Public Works of the City of Los Angeles et al.* (decided June 4, 1951—not officially reported). In said case attention is called to the 1941 California Act which amended the charter of the City of Los Angeles. The provisions of said amendment, *which are similar in many respects to the provisions of the instant Act*, are as follows:

> 'no person shall hold or retain or be eligible for any public office or employment in the service of the City of Los Angeles, in any office or department thereof, either elective or appointive * * *, who is now or has been within five (5) years prior to the effective date of this section, or who may, after this section becomes effective, become *a member of or affiliated with* any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years, advised, advocated or taught the overthrow by force or violence of the Government of the United States of America or of the State of California.'

"It will be noted that said 1941 Act *did not require any oath* to be taken by officers or employees coming within the purview thereof. However, in 1948, an ordinance requiring an oath was adopted by said city, the material part of which is as follows:

> 'I further swear (or affirm) that I * * * within the period beginning five (5) years prior to the effective date of the ordinance * * * have not * * * been or become *a member of or affiliated* with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other

unlawful means of the Government of the United States, or of the State of California.'

"It will also be noted that the five-year period mentioned in said city ordinance did not begin until two years after the effective date of said 1941 legislative Act. Therefore, if any person became a member of or affiliated with an organization, such as is referred to in said 1948 ordinance, he did so with full knowledge of the provisions of said Act, same being *by operation of law* incorporated into his election or appointment to public office or employment.

"In this connection the court held:

'The Charter amendment defined standards of eligibility for employees and specifically denied city employment to those persons *who thereafter* should not comply with these standards. While the amendment deprived no one of employment with or without trial, yet from its effective date it terminated any privilege to work for the city in the case of persons *who thereafter* engaged in the activity proscribed.

'The ordinance provided for *administration implementation* of the provisions of the Charter amendment. The oath imposed by the ordinance proscribed to employees activity which had been *denied them* in identical terms and with identical sanctions in the Charter provisions effective in 1941. *The five-year period provided by the oath extended back only to 1943.*

'The ordinance would be *ex post facto* if it imposed punishment for *past conduct lawful at the time it was engaged in.* Passing for the moment the question whether separation of petitioners from their employment must be considered as punishment, the ordinance clearly is not *ex post facto. The*

> *activity covered by the oath had been proscribed by the Charter* in the same terms, for the same purpose, and to the same effect *over seven years before*, and two years prior to the period embraced in the oath. *Not the law but the fact was posterior.*
>
> 'Bills of attainder are "legislative Acts * * * that apply either to named individuals *or to easily ascertainable members of a group* in such a way as to inflict punishment on them without a judicial trial * * *" *United States* v. *Lovett*, 328 U.S. 303, 315 (1946). Punishment is a prerequisite. See concurring opinion in *Lovett, supra*, at 318, 324. *Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon "the circumstances attending and the causes of the deprivation."* *Cummings* v. *Missouri*, 4 Wall. 277, 320 (1867). We are unable to conclude that punishment is imposed by a *general regulation* which merely provides standards of qualification and eligibility for employment.'

"The 'circumstances attending and the causes of the deprivation,' above referred to, which the court indicated prevented the 1948 ordinance from being invalid, was the fact that the five-year provisions of the oath required by said ordinance *did not antedate* the like provisions of the 1941 Act (charter amendment), and that a person taking the oath was only in effect required to swear that he had not violated the *general regulatory* provisions of an Act which was in existence at least seven years prior to the adoption of said ordinance.

"The above decision, by necessary implication, supports defendants' position here, *since there was no law in existence at any time during the five-year period referred to in the instant Act* which by 'gen-

eral regulation' or otherwise made it unlawful for a public officer or employee of this State to be a member of an agency or organization which had been declared by the United States Attorney General, etc., to be a 'communist front or subversive organization.'

"In this connection, however, attention is called to the fact that while 51 O.S. 1941, § 32 (as amended in 1945) was repealed by Section 8 of the instant Act * * *, *51 O.S. 1941, §§ 31, 33 and 34 were not repealed* (Sections 31, 32, 33 and 34 were originally enacted as Chapter 1, Title 51, page 209, Oklahoma Session Laws 1941) *and are still in full force.* Section 31, in effect, makes a person ineligible

> 'by election or appointment, to hold any State, county, school district or municipal *office in this State,*'

if at the time of his election or appointment he was affiliated with certain *designated* organizations, etc., or was advocating, etc., certain *designated* subversive doctrines; Section 33 provides for the removal by *court action* of State, county, school district and municipal officers who at the time of the filing of the action were so affiliated or advocating, etc.; and Section 34 makes it the duty of public officers having authority to appoint persons to fill State, county, school district or municipal office, to ascertain before making an appointment whether the prospective appointee is such a member or so advocates, etc., and if so, to not appoint the same.

"Inasmuch as the above abstracted sections of said 1941 Act are not based on *automatic forfeitures* predicated on *past* affiliations or activities nor to *undesignated* organizations, and since said sections do not apply to definite contracts of public *employees* lawful when entered into, it would appear that same are not invalid under the provisions of Section 15, Article 2 of our State Constitution or

Since the *Lovett case* (decided in 1946) cites the *Cummings case* with approval, we quote (for the information of the court) from the *Lovett case*, as follows:

> "We hold that § 304 falls precisely within the category of Congressional actions which the Constitution barred by providing that "No Bill of Attainder or *Ex Post Facto* Law shall be passed." In *Cummings v. Missouri*, 4 Wall. (U.S.) 277, 323, 18 L. ed. 356, 363, this Court said, "A bill of attainder is a legislative Act *which inflicts punishment without a judicial trial*. If the punishment be less than death, the Act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *The Cummings decision involved a provision of the Missouri Reconstruction Constitution which required persons to take an Oath of Loyalty as a prerequisite to practicing a profession.* Cummings, Catholic Priest, was convicted for teaching and preaching as a minister without taking the oath. The oath required an applicant to affirm that he had never given aid or comfort to persons engaged in hostility to the United States and had never "*been a member of or connected with any order, society, or organization inimical* to the Government of the United States * * *." In an illuminating opinion which gave the historical background of the constitutional prohibition against bills of attainder, *this Court invalidated the Missouri constitutional provision both because it constituted a bill of attainder and because it had an ex post facto operation.* On the same day the *Cummings case* was decided, the court, in *Ex parte Garland*, 4 Wall. (U.S.) 333, 18 L. ed.

366, also held invalid on the same grounds an Act of Congress *which required attorneys practicing before this Court to take a similar oath.* Neither of these cases has ever been overruled. They stand for the proposition that legislative Acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group *in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.* Adherence to this principle requires invalidation of § 304. We do adhere to it.

'Section 304 was designed to apply to particular individuals. Just as the statute in the two cases mentioned it "operates as a legislative decree of perpetual exclusion" from a chosen vocation. *This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type.* It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, 18 U.S.C.A., § 2, 7 F.C.A., Title 18, § 2; acceptance of bribes by members of Congress, 18 U.S.C.A., §§ 199, 202, 203, 7 F.C.A., Title 18, §§ 202, 203; or by other government officials, 18 U.S.C.A., § 207; and interference with elections by Army and Navy officers, 18 U.S.C.A., § 59, 7 F.C.A., Title 18, § 59.

'Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act *specifically cutting off the pay of certain named individuals found guilty of disloyalty,* makes it no less galling or effective than if it had been done by

an Act which designated the conduct as criminal.' "

ANSWER TO APPELLANTS' POINTS II, V AND VI

Appellants' Point II (Br. 55-66) is set forth on page 55 of their brief, as follows:

> "The forfeiture of appellants' contracts and the denial of accrued compensation thereunder for failure to take the Oath, denies appellants liberty and property without due process of law, because certain requirements of the Oath bear no reasonable relation to the purpose of the Act."

Appellants' Point V (Br. 86-94) is set forth on page 86 of their brief, as follows:

> "The Act perforce the requirements of the Oath denied appellants liberty without due process of law, in violation of the Fourteenth Amendment, by forfeiting contracts of employment and by denying payment of accrued compensation thereunder, because appellants failed to take the Oath when such failure was due to a serious and reasonable doubt as to its meaning."

Appellants' Point VI (Br. 94-108) is set forth on page 94 of their brief, as follows:

> "The Act perforce the requirements of the Oath impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, in that the statutory forfeiture of said contract and the denial of the accrued compensation thereunder is effected by an unreasonable exercise of the reserved protective power of the State."

The above points are either *directly* or *indirectly* discussed in "Proposition 6" (pp. 33-41) of the brief of The Board of Regents, *et al.*, in the Supreme Court of Oklahoma, as follows:

> "Is a person (such as a public school or college teacher, instructor or employee) holding a contract of employment for a fixed period ending on or prior to the expiration of the current fiscal year, to-wit: prior to June 30, 1951, which contract was lawfully entered into before April 9, 1951, the effective date of the Act, who fails to take the oath as prescribed in the Act, prevented by reason of said failure from being paid compensation and/or expenses earned or incurred by him under the provisions of said contract?

"In relation to the above proposition attention is called to Section 15, Article 2 (Bill of Rights) of our State Constitution, the material part thereof being as follows:

> 'No * * * law impairing the obligation of contracts shall ever be passed. * * *'

"It is clear that House Bill No. 8, *as applied to a contract such as is considered here*, violates the above constitutional provision, *that is*, unless such application is valid under the police power of the State. While plaintiff takes the position that the Act, as so applied, is valid under said police power, many citizens of the State (including intervenors) do not, and hence we respectfully ask the Court to give its opinion thereon.

"The position of the Attorney General as to Proposition '6', *supra*, is set forth in his opinion as follows:

> '6. As to a person holding a *contract of employment for a fixed period ending on or*

prior to the expiration of the current fiscal year, to-wit: prior to June 30, 1951, which contract was lawfully entered into *before April 9, 1951*, the effective date of the Act, the Attorney General is of the opinion that under that part of Section 15, Article 2 of our State Constitution, which provides that no law

> "impairing the obligation of contracts shall ever be passed,",

the failure of said person to take the oath as prescribed in the Act will not prevent him from being paid his compensation and/or expenses as provided therein. *However, as to such a contract entered into after April 9, 1951, including a contract of employment for a future fiscal year, the converse of the above rule would be true.* Moreover, the salary or emoluments of a public officer coming within the purview of Section 10, Article 23 of our State Constitution, should be paid to him, notwithstanding his failure to timely take the oath.'

* * * * *

"Attention is also called to the case of *State ex rel. Roth, Trustee* v. *Waterfield*, 167 Okl. 209, 29 P. 2d 24, wherein the first, second and fifth paragraphs of the syllabus are as follows:

> '1. The police power is an attribute of sovereignty possessed by every sovereign state and is inherent in States of the American Union. While incapable of exact definition, *it is not without its limitation* and must be exercised in a manner consistent with constitutional requirements *both State and national.*
>
> '2. In order to be justified as a proper exercise of the police power, a legislative

enactment must be neither unreasonable, capricious, nor arbitrary, *and it must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion.*

'5. Senate Bill No. 76 of the 14th Legislature, commonly known as the "Moratorium Law" (Session Laws 1933, Chapter 16, page 42), examined with a view of determining whether it constitutes a proper exercise of the *police power* of the State, held, that Section (1) thereof and each provision of that section is invalid and unconstitutional *for the reason that it arbitrarily delays mortgage foreclosure actions without adequate provisions for compensation to the mortgagee, and without any provision for protection of the rights of the mortgagee during the period of delay;* that such section likewise goes beyond the reasonable demands of the occasion, being applicable according to its terms to all classes of mortgage foreclosures *without regard to the merits of the particular case,* and that such section also violates Section 6 of Art. 2 of the Constitution of the State of Oklahoma, providing that courts shall be open at all times and speedy remedies afforded for every wrong. Sections 2, 3 and 4 of said Act held valid as a reasonable exercise of the police power of the State in so far as such sections vest in the trial courts a judicial discretion to grant continuances in proper cases, *upon conditions protecting the rights of the mortgagee, and providing compensation for the delay thus afforded.*'

"In the body of the opinion of the *Waterfield case, supra,* it is stated:

'The plaintiff asserts that the remaining sections of the Act, and especially Paragraph 2 of Section 1 of the Act, violate the provisions of our Constitutions, State and national, relating to *"impairment of the obligations of contract,"* or equal protection of the laws.

'The defendant, while denying that these constitutional provisions are violated, *urges* that even though offensive to constitutional *requirements, the Act should be upheld as a fair and reasonable exercise of the police power. The contention of the defendant is that the entire Act is justified without restrictive interpretation* on the theory that in view of existing economic conditions, *it is a just and reasonable exercise of the police powers of the sovereign State.* This view embraces the idea that the power, when reasonably exercised by appropriate legislation, *is not restricted by constitutional limitations*, and may infringe upon rights guaranteed to citizens by specific provisions of our fundamental and basic law. *A view is thus expressed which, pursued to its ultimate conclusions, vests in the Legislature the power, in emergency cases, to suspend the Constitution to the extent that that basic document appears to unreasonably restrict their power to legislate.* It makes the Legislature the judge, in the first instance, of when such an emergency exists and to what extent it may reasonably go in suspending or overriding constitutional inhibitions.

'This seems to be an extremely dangerous doctrine fraught with possibilities which may undermine the very foundation of American democracy.

* * * * *

'When the exercise of the police power affects existing contracts, *how is it to be reconciled* with the clauses in the Federal and State Constitutions prohibiting the impairment of the obligation of contracts? Section 15 of Art. 2 of our State Constitution provides:

> "No bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be passed."

'Likewise Section Ten. (10) of Art. One (1) of the Constitution of the United States contains the following:

> "*No State shall* * * * *pass any* bill of attainder, *ex post facto law, or law impairing the obligation of contracts*, or grant any title of nobility."

* * * * *

'With few exceptions its use (State's police power) has been confined to legislation directly and ostensibly relating to public health, safety, and welfare, *and the effect of such legislation upon existing contracts was only incidental.*

'There is a vast difference and a vivid distinction between a police regulation enacted for the obvious purpose of preserving peace, health, or safety, which *incidentally* affects contracts or property rights on the one hand, and, on the other hand, a law which is *directly intended* to change or alter contractual relations between individuals in connection with contracts of a class which have never been regarded as affecting the public peace or safety and morals of the

community, in the hope that the change of such contractual relations may incidentally improve the economic welfare of the community.

* * * * *

'As stated by the Supreme Court of the United States in the case of *Holden* v. *Hardy*, 169 U.S. 366, 42 L. ed. 780:

> "Recognizing the difficulty in defining, with exactness, the phrase, 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, *without compensation;* and that no one shall be condemned in his person or property *without an opportunity of being heard in his own defense.*"

'And again in the case of *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, Mr. Justice Brewer said:

> "The equal protection of the laws, which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, *in whatever form it may be enacted*, by which the property of one individual is, without compensation, wrested from him for the benefit of another, *or for the public.*"

'Likewise the provisions of Section 1 have the practical effect of overriding Sec-

tion 6 of Article 2 of our State Constitution, which provides:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation, and right and justice shall be administered *without sale, denial,* delay, or prejudice."

"In the opinion of the court 'On Rehearing' in the *Waterfield case, supra,* the decision of Justice Hughes in the case of *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398, 78 L. ed. 413, was cited with approval as holding that

> 'Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.'

"In the case of *Dobbins* v. *Los Angeles,* 195 U.S. 223, 49 L. ed. 169, the Supreme Court of the United States, at Page 237 of the U. S. citation, quoted with approval from the case of *Connolly* v. *Union Sewer Pipe Co.,* 184 U.S. 540, 588, as follows:

> 'But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, *even when avowedly enacted in the exercise of its police powers,* must yield to that law. No right granted or secured by the Constitution of the

> United States can be impaired or destroyed by a State enactment, *whatever may be the source from which the power to pass such enactment may have been derived.* "The nullity of any Act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.'

"In 56 C.J., page 382, § 303, under the subject, 'Schools and School Districts,' it is stated:

> 'A teacher, who has been appointed to the position and accepted it, from the time of his acceptance *stands in a contract relation* as distinguished from the tenure or holding of a public officer. He holds his position by contract and not at the will of the sovereign power. * * *'

"In the case of *Hall* v. *Wisconsin*, 103 U.S. 5, the editorial headnote is as follows:

> 'A contract between a State and a party, *whereby he is to perform certain duties for a specific period at a stipulated compensation*, is within the protection of the Constitution; and on his executing it he is entitled to that compensation, although before the expiration of the period the State *repealed the statute* pursuant to which the contract was made.'

"In the case of *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 595, 82 L. ed. 685, the 4th editorial headnote is as follows:

> 'Although the principal function of a legislative body is not to make contracts but to make laws which declare the policy of the State and are subject to repeal when a subsequent Legislature shall determine to alter that policy, a legislative enactment may contain provisions which, when accepted as a basis of action by individuals, become contracts between them and the State or its subdivisions, *within the protection of the provisions of the Federal Constitution forbidding the impairment of contracts by State action.*'

"Before concluding our argument as to Proposition '6', *supra*, defendants again desire the court to consider the * * * above-cited cases; and to hold that the Act, as applied to the contracts involved in Proposition '6' goes 'beyond the *reasonable demands* of the occasion' within the meaning of the second paragraph of the syllabus * * * of the *Waterfield case, supra.*

"In this connection we ask the court to note that the Act requires a person (as here) holding a definite contract for a fixed period expiring during the fiscal year ending June 30, 1951, in order to serve and draw compensation during the last few weeks of his contract, to take an oath which, among other things, *requires him to swear:*

> (1) That he will 'take up arms' etc., even though he may have *religious scruples* against bearing arms. The theory that he is not bound by said oath to bear arms but may in lieu thereof render non-combatant service and hence can properly sign the oath with mental reservations (the trial court did not permit written reservations), *is at best, a debatable theory;* and

(2) that he is 'not affiliated, directly or indirectly, * * * with any foreign * * * government,' although he may be a *citizen of another country* but lawfully in the United States. The theory that he is not bound by said oath and is not disloyal to his native land in taking the same, with or without a written statement attached thereto, * * * as permitted by the trial court herein, *is likewise, at best, a debatable theory.*

"Suffice to say that most any good and loyal American, who might be doing 'exchange' teaching or professional or research work in a foreign country, would hesitate, and probably would refuse without hesitation, *to sign any such required oath of allegiance* demanded by such foreign country as a prerequisite to receiving pay for the remainder of his contract, valid when entered into, and mutually observed until near its expiration."

ANSWER TO APPELLANTS' POINTS III AND IV

Appellants' Point III (Br. 66-77) is set forth on page 66 of their brief, as follows:

"The Act, as applied to appellants, Lee, Correll, Baum, Schmoe and Nietz, each of whom sincerely believes that bearing arms against one's fellow man is contrary to divine law, by requiring each of them to promise under oath to bear arms, denies each named appellant his liberty without due process of law, contrary to the Fourteenth Amendment; because as to the named appellants, the Act is a law respecting the free exercise of religion."

Appellants' Point IV (Br. 77-85) is set forth on page 77 of their brief, as follows:

> "The Act perforce the requirements of the Oath as applied to Lee, Correll, Baum, Schmoe and Nietz, in requiring each of them to take an oath to bear arms, when each holds sincere religious convictions contrary thereto, constitutes an unconstitutional interference with the exclusive powers of the Congress to raise and support armies and provide and maintain a navy, under Article 1, Section 8 of the Constitution of the United States, when antecedently to the passage of the Act, the Congress, by law, had exempted such persons from the duty to bear arms."

The above points are either *directly* or *indirectly* discussed in "Proposition 3" (pp. 20-23) of the brief of The Board of Regents, *et al.*, in the Supreme Court of Oklahoma, as follows:

> "Does the Act require public officers and employees having religious scruples against bearing arms to take the oath in the exact form set forth in Section 2 thereof, or will the Act be substantially complied with if such officers or employees modify the oath, either in its body or by appending words thereto, in effect stating that in lieu of bearing arms they will render non-combatant service?
>
> "The Act makes no exception as to public officers or employees such as are above mentioned, and hence under a literal interpretation of the Act the oath taken thereby cannot be modified by use of either of the methods above set forth. While plaintiff takes the first position above presented and not the second, many citizens of the State (including intervenors)

do not, and hence defendants respectfully ask the court to give its opinion thereon.

"In this connection it will be noted that in the instant case (C.-M. 238 to 246) the trial court [R. 51-58] in effect held:

(1) That the oath could not be modified by use of either of the methods above set forth, and

(2) that if an oath is so modified by persons having religious scruples against bearing arms but not informed that such provisions in their oath were not constitutionally binding thereon, said persons (other than those who intervened herein)—see Paragraph 6 of the court's conclusions of law (C.-M. 240) as well as persons who for the lack of such information failed to take the oath, after being so informed and if the Board of Regents find that said failure or modification was due to an 'honest mistake,' could thereafter (no time limit was fixed) be reinstated by taking an unmodified oath.

"In the recent case of *Allen Smith* v. *Charles Smith, Superintendent of the Central State Hospital*, No. 16185, District Court, Cleveland County, the trial court on May 23, 1951, held (no appeal was taken) in conformity with holding No. '(1)', *supra*, and in relation to a situation such as is presented in holding No. '(2)', *supra*, held (also without fixing a time limit) that the plaintiff in said case was

> 'entitled to reinstatement by his subscribing to the oath in its entirety as set forth in House Bill No. 8 * * *.'

"The position of the Attorney General as to Proposition '3', *supra*, is set forth in his opinion as follows:

'3. In relation to that part of the oath which requires public officers or employees to state

> "that I will take up arms in the defense of the United States in time of war or National Emergency, if necessary,"

attention is called to the case of *Girouard v. United States* (1946), 328 U.S. 61, 90 L. ed. 1084, in which the Supreme Court of the United States *expressly overruled* three of its former decisions holding that the statutory oath of allegiance taken by aliens in effect required them to state in their applications for citizenship that they would "bear arms" in time of war, and in effect held (in harmony with dissenting opinions filed in said former cases of Chief Justice Hughes and Justice Holmes) that said oath of allegiance, when properly construed, did not so require. In support of said holding the court on pages 65, 66 and 68 of the U.S. citation, used the following language:

> "Petitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices. While Article VI, Clause 3 of the Constitution provides that such officials, both of the United States and the several States, 'shall be bound by Oath or Affirmation, to support this Constitution,' it significantly adds that *'no religious Test shall ever be required as a Qualification to any Office of Public Trust under the United States.'*
>
> "As Mr. Chief Justice Hughes pointed out (*United States* v.

> *MacIntosh, supra* [283 U.S.] p. 633), *religious scruples against bearing arms* have been recognized by Congress in the various draft laws. * * * Congress has thus recognized that one may adequately discharge his obligations as a citizen *by rendering* non-combatant service. * * *
>
> "Mr. Justice Holmes stated in the *Schwimmer case* (279 U.S. pp. 654-55): * * * The victory for freedom of thought *recorded in our Bill of Rights* recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. *Freedom of religion* guaranteed by the First Amendment is the product of that struggle."

'Attention is also called to the 12th and 13th paragraphs of the syllabus of *Ex parte Walrod* (1941), 73 Okl. Cr. 299, 120 P. 2d 783, and to the fact that the above-quoted provision of Clause 3, Article 6 of our Federal Constitution is almost identical to that part of Section 2, Article 1 of our State Constitution which provides

> "no religious test shall be required for the exercise of civil or political rights."

'The Attorney General is, therefore, of the opinion that while the provisions of the oath which require public officers and employees to state

> "that I will take up arms in the defense of the United States in time of War or National Emergency, if necessary,"

are not unconstitutional, *same cannot constitutionally be applied to a person who has religious scruples against bearing arms,* and hence is of the further opinion that as to such person said statement in his oath is of no force or effect and is not binding thereon. In fact, the above concluding words "if necessary," construed in connection with federal laws permitting persons having religious scruples against bearing arms to render non-combatant service in lieu of bearing arms, in our opinion, indicates a legislative intent that such a person taking the new oath agrees to either bear arms or render non-combatant service.' "

CONCLUSION

WHEREFORE, premises considered, The Board of Regents, *et al.*, respectfully submit to this Court, for its consideration, the issues involved in this appeal without further comment or argument.

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OCTOBER, 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 14

ROBERT M. WIEMAN; NANCY KENT ZIEBUR; WERNER C. BAUM; SAMUEL HUNT LEE, JR.; MALCOLM CORRELL; LILLIAN A. SCHMOE, and LUELLA NIETZ,

Appellants,

versus

PAUL W. UPDEGRAFF; THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, State Treasurer of the State of Oklahoma, and WILBURN C. CARTWRIGHT, State Auditor of the State of Oklahoma,

Appellees.

Appeal from the Supreme Court of the State of Oklahoma

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*.

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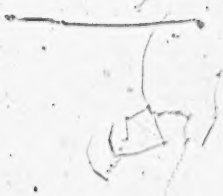

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Appellees.

Appeal from the Supreme Court of the State of Oklahoma

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of American Civil Liberties Union, as *Amicus Curiae*

The American Civil Liberties Union is appearing herein with the written consent of the parties, through their attorneys, which has been filed with the Clerk of this Court.

The objective of the American Civil Liberties Union, a nationwide, nonpartisan organization, is the advancement of the fundamental liberties guaranteed by the Constitution. Among the important issues concerning government's

relation to the individual, in the instant appeal, are freedom of religious belief and political expression from unreasonable suppression, as well as the protection guaranteed by due process of law against ill-focussed, vague legislation that leaves the citizen uncertain as to the boundary between legality and illegality.

The American Civil Liberties Union does not, of course, favor the particular religious belief of appellants, nor any particular political opinion or association; it is concerned with the instant case because the best assurance of democratic liberties for any member of our society is their preservation for all members, regardless of the merit of the opinion or association involved in the specific case.

Points to be Argued by Amicus

1. The State's requirement of an Oath to bear arms as a condition for any employment by the State is an unconstitutional deprivation of the freedom of religion and opinion guaranteed by the due process clause of the Fourteenth Amendment.

2. The State's requirement of an Oath of non-affiliation with unnamed organizations, as a condition for any employment by the State, violates the due process guarantee of the Fourteenth Amendment because it involves an excessive delegation of legislative power and because it is vague, uncertain, and an unreasonable restraint on freedom of association.

3. The State's prohibition of any employment by the State except upon subscription to an Oath denying past membership in unnamed organizations, violates the due process guarantee of the Fourteenth Amendment and Article I, Section 10 of the Constitution prohibiting ex post facto laws and bills of attainder.

Facts

The facts are stated in appellants' brief.

Summary of Argument

I. In view of appellants' religious opposition to bearing arms, the State's requirement that they take an Oath of willingness to bear arms in order to retain their State employment, or be eligible for any State employment, was an exercise of coercion upon their religious practice and conviction. This restraint upon religious freedom is unjustified. For willingness to bear arms is not, under this Court's decisions, a necessary factor in attachment to the principles of the Constitution or a necessary duty of good citizenship; unwillingness shows no dissatisfaction with our form of government, but merely non-conformist thought as to the right method of defending it. Since willingne - to bear arms does not therefore reflect on fitness for Government employment and the Oath provisions must have a reasonable relation to fitness, the Oath provision on arms-bearing is an unconstitutional interference with freedom of religion and opinion.

II. In requiring a State employee to swear that he is not affiliated with any organizations listed as "a communist front or subversive" by the United States Attorney General, the Oklahoma Legislature did not consider or appraise the organizations listed by the Attorney General; and it formulated no policy except that affiliation with an organization was proscribed if the Attorney General had applied to it the words "communist front" or "subversive". By accepting sight unseen whichever of the possible divergent meanings the Attorney General had adopted in applying these vague terms, the Legislature failed to fully and properly discharge the legislative function, in violation of the due process guarantee of the Fourteenth Amendment.

The Oath provision on non-affiliation further violates the due process guarantee because of its vagueness and uncertainty. Not only were the Attorney General's lists unavailable to those required to take the Oath, but even if a list or lists were discovered, they could not be relied upon as establishing the complete coverage of the Oath; certainty would be impossible on the negative proposition that there were no other and further listings. The Oath is not therefore so framed that individuals of ordinary intelligence can determine with certainty what is legal and illegal thereunder, and what steps it requires to avoid the penalty of proscription from State employment.

The non-affiliation Oath is further a violation of due process because it imposes an unreasonable restraint on freedom of association. The uncertainty as to what organizations are covered by the Oath results in a fear, and thus a restraint, of association with *all* organizations concerned with political, social, or economic questions. Further, the Oath is not a reasonable fitness requirement, and exceeds any employment qualification approved by this Court, in that it establishes affiliation in organizations other than those advocating overthrow of the government as a conclusive barrier to State employment.

In addition, the Attorney General's listing of an organization only means that he regarded it as suspicious to the degree where membership therein might be an indication, subject to refutation by the member, of unsuitability for government employment. Oklahoma is obviously unreasonable in proscribing a person from State employment because of affiliation with an organization about which it has only been determined that membership therein can be regarded as *some evidence* of disqualification for government employment. Finally, affiliation with organizations listed as "subversive" could not in any event be used as a conclusive reason for proscription from employment, where, as here, there is grave doubt as to the fairness and accuracy of the listings.

III. Besides having the constitutional infirmities of the provision on current affiliations, the Oath as to past membership is a violation of the constitutional prohibition against ex post facto laws and bills of attainder. This provision cannot be regarded as a test of fitness for employment, for it does not weigh past acts to determine present personal qualification, but instead makes past association an irrebuttable cause for proscription from employment. Rather than testing fitness the Legislature through the Oath on past membership, imposes a severe punishment,—proscription from all opportunity for State employment,—on the basis of acts which were not penalized at the time they were undertaken; it marks groups for punishment by and for their past acts without affording them any way to avoid the penalty by present conduct.

ARGUMENT

I. The State's requirement of an oath to bear arms as a condition for any employment by the State, is an unconstitutional deprivation of the freedom of religion and opinion guaranteed by the Fourteenth Amendment.

Five of appellants refused to subscribe to the provision of the Oath "that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary", because their religious faith is opposed to bearing arms (R. 30-31, 32, 41, 43, 52). The contradiction between the Oath and the appellants' religious belief was not mitigated by the State court's construction of the Oath to mean that the jurator would bear arms if so directed by law (R. 63, 68); for, despite the time-honored respect for conscientious objectors, Congress might, as the State court pointed out (R. 68), abrogate their traditional statutory exemption.

There is no doubt under the decisions of this Court that Oklahoma's requirement that appellants either forswear their religious practice and conviction—with a perjury penalty for false swearing—or sacrifice their State employ-

ment, constitutes an interference with the freedom of religion protected by the Fourteenth Amendment. For the State inflicts a serious loss when it deprives an individual of his employment by the State, and forecloses him from opportunity for State employment; it therefore exerts a strong compulsion, when it attaches conditions to State employment, towards compliance with the conditions.[1] Here the interference with the Fourteenth Amendment freedoms through the conditioning of State employment is wholly unjustified, and is therefore unconstitutional.

Even when religious belief is expressed in overt acts, the State may not, under the Amendment, interfere with freedom of religion except on the most urgent grounds; and the guarantee against interference with belief itself is "absolute".[2] Oklahoma's statute invades the "forbidden domain" of belief itself.[3] For it does not penalize conduct:

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[1] See *American Communications Association* v. *Douds*, 339 U. S. 382, where the sanction for refusal to take a "non-Communist" Oath was probable loss of employment as a trade union officer, and, in determining whether the restraint thus imposed on First Amendment rights was justifiable, it was said: "indirect 'discouragements undoubtedly have the same coercive effect upon First Amendment rights as imprisonment, fines, injunctions, or taxes * * * for this reason * * * the effect of the statute in proscribing beliefs must be carefully weighed * * *'" (339 U. S. at p. 399). The opinion made it clear, by reference to *United Public Workers* v. *Mitchell*, 330 U. S. 75, that its reasoning would be equally applicable to a requirement of an Oath as a condition of Government employment (see 339 U. S. at p. 402). See also *United States* v. *Lovett*, 328 U. S. 303; *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 185 (Jackson, J., concurring), as to gravity of a loss of opportunity for Government employment.

[2] *Cantwell* v. *Connecticut*, 310 U. S. 296, 303. And see *Martin* v. *Struthers*, 319 U. S. 141; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

[3] *United States* v. *Ballard*, 322 U. S. 78, 86-87. This Court has never expressed an opinion favorable to an Oath or employment qualification based on belief. In the *Douds* case, the lower court's judgment, insofar as it upheld the provision of the Oath relating to belief, was affirmed by an equally divided court, and therefore cannot be taken as an expression of opinion by this Court. *Hertz* v. *Woodman*, 218 U. S. 205.

—a failure to take up arms,—but a state of mind as to a possible future command; it is directed at a lack of intention and an unwillingness to bear arms if so ordered. But even if the Oath is viewed as a restraint on religious practice rather than belief, it can find no justification.

For, though it is granted, as this Court held in the *Garner* case,[4] that the State may establish tests for fitness of its employees, willingness to bear arms has no reasonable relation to fitness for State employment. Allegiance to the United States does not import a willingness to bear arms, nor is such willingness a part of attachment to the principles of the Constitution, nor a necessary duty of good citizenship.[5]

While this Court reasoned in *Garner* that "loyalty" relates to fitness, the State court's further steps in this chain:—that willingness to bear arms relates to loyalty and therefore must relate to fitness (R. 68)—were based on a misconception of this Court's meaning when it spoke of loyalty. For this Court discussed loyalty as an attribute of fitness for Government employment by analogizing to the loyalty expected by a private employer;[6] loyalty in this sense means an identity of interests sufficient to assure the faithful performance of duties and to negative use of the position for acts inimical to the employer. The "loyalty" customarily sought by an employer, to which this Court referred, does not involve a search of the employee's heart and mind to determine his abstract beliefs or the conformity of his general credo with the employer's. We suggest that this Court erred in the *Garner* case in concluding that an Oath of non-advocacy of overthrow of the Government,—even if overthrow is advocated merely as an abstract and ultimate goal,—can reasonably be used as a test of fitness for all Government positions indiscriminately.

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[4] *Garner* v. *Los Angeles Board*, 341 U. S. 716.

[5] *Girouard* v. *United States*, 328 U. S. 61, 65, 66, 68, 69.

[6] 341 U. S. at p. 720.

In any event, in the case of unwillingness to bear arms, this belief does not signify any type of dissatisfaction with our form of government, but merely a disagreement with majority opinion as to the right method of defending it; thus, such unwillingness is no basis whatever for supposing disloyalty in the sense of inclination to infidelity to duty in a non-military Government job.[7] In approving a loyalty test as a test of fitness for Government employment, this Court could not have intended the States to read "loyalty" to mean conformity to orthodox opinion.

The evil of a Test Oath,—that it presumes disloyalty[8]—is compounded in Oklahoma's Oath by a novel extension of the disavowals the jurator must make to refute the presumption. Oklahoma's extension of its employee "loyalty" test to require a sacrifice of conviction and a commitment as to opinion that has no reasonable relation to employee fitness, is an unjustifiable and unconstitutional interference with the freedom of religion and opinion protected by the due process clause of the Fourteenth Amendment.

II. The State's requirement of an oath of non-affiliation with unnamed organizations, as a condition for any employment by the State, violates the due process guarantee of the Fourteenth Amendment because it involves an excessive delegation of legislative power, and because it is vague, uncertain, and an unreasonable restraint on freedom of association.

The highest State court construed the Oath provision "that I am not affiliated directly or indirectly with * * * any foreign political agency, party, organization, or Gov-

[7] The fact that Congress might be justified by a military emergency in penalizing a refusal to bear arms, of course does not support the constitutionality of Oklahoma's interference with First Amendment freedoms through penalizing an unwillingness to bear arms in its regulation of employment, since the purported justification and rationale of the two measures are wholly different.

[8] See *Ex Parte Cummings*, 4 Wall. 277, 331.

ernment, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization" to mean "I am not affiliated with any organization on any list or lists of communist front or subversive organizations which had been prepared by the Attorney General prior to April 9, 1951, the date of passage of the Act" (see R. 63). We suggest that the State court's drastic paraphrasing of the Oath can hardly be justified as an effectuation of legislative intent,[9] and involves an assumption of the legislative power to re-draft the statute, rather than merely the authority to interpret it. But assuming the State court's rendition of the Oath to be within judicial authority, it cures none of the Oath's Constitutional infirmities.

A. The non-affiliation provision of the Oath violates the guarantee of due process because it involves an excessive delegation of legislative power to the United States Attorney General.

The Legislature formulated no policy and came to no determination as to the organizations with which affiliation is proscribed, other than that they should have been deemed by the United States Attorney General to be "a communist front or subversive."

For the State court indulged in a convenient fiction, rather than a factual deduction, when it "assumed" (R. 63), without any supporting data, that the Legislature had appraised for itself the character of the organizations covered by the Oath.[10] If the Legislature intended to adopt,

[9] It is obvious that the legislature intended the Oath to cover for each jurator any organization listed prior to his entering State employment, and that it did not intend to proscribe organizations on past lists, which might be extinct, while permitting affiliation with currently listed organizations.

[10] This Court "must review independently" the facts essential to the adjudication of Federal constitutional questions. *Oyama* v. *California*, 332 U. S. 633, 636. See also *Chambers* v. *Florida*, 309 U. S. 227, 228-229; *Norris* v. *Alabama*, 294 U. S. 587, 590.

as some of the legislators sponsoring the statute explained,[11] the list of approximately 2500 organizations set forth by the House Un-American Activities Committee in 1951 as its "Guide to Subversive Organizations and Publications," it is apparent that the Legislature could not have deemed it necessary, and could not have undertaken, to investigate the organizations it intended to proscribe. And unless this view of the Oath's coverage is accepted as the Legislature's intention, it is clear that the Legislature did not feel it necessary even to consider what list or lists were covered by the Oath, since there is no hint that it knew of the existence of any list by an "authorized agency" other than the list of 2500. Needless to say, the Legislature's failure to focus on any particular list or lists necessarily precludes the possibility that the Legislature considered the character of the listed organizations.

The Legislature's view that it was unnecessary for it to appraise for itself the organizations it was proscribing—so irrefutably demonstrated with respect to the organizations listed by "any authorized agency"—logically must have prevailed when it referred to the list or lists of the Attorney General. In any event, the Legislature's ignorance specifically of the Attorney General's lists, and *a fortiori* its failure to appraise the conduct and character of the organizations included on them, is demonstrated by the fact that the Oath refers to organizations listed as "communist, front or subversive." Since the Attorney General lists organizations as "communist" but does not use the designation "communist front",[12] it is apparent that the Legislature would have included the former term in the

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[11] See legislative background, recited in Brief of Board of Regents in the Supreme Court of the State of Oklahoma in the instant case, pages 29, 31 (a copy of this brief has been filed with the Clerk of this Court).

[12] See classification used by Attorney General, 5 C. F. R., 1949, c. II, Pt. 210, pp. 203-205, 13 Fed. Reg. 6137-6138.

Oath if it had been familiar with the Attorney General's lists.[13]

Thus, it is clear that the Oklahoma legislature accepted the Attorney General's determination of what organizations it should proscribe for State employees, with no limitation other than that he deem them "a communist front or subversive." In using such a loose and imprecise standard[14] the Legislature abdicated its legislative power to the Attorney General; failing to crystallize its intention beyond this vague generality, the Legislature adopted, sight unseen, whatever policy the Attorney General had read into these broad and elastic terms, accepting his arbitrary discretion. When the Legislature in effect states, as it has here, that it bars from employment members of any organizations the Attorney General has chosen to disapprove, it has not adequately and sufficiently exercised the legislative function to comport with due process of law.[15]

B. The Oath violates the guarantee of due process because the scope of its prohibition is vague and uncertain.

A further unconstitutional result of the Legislature's lack of care and precision is the impossibility of the juror's determining with certainty what the Oath prohibits. As construed by the State court, the statute imposes, as a condition of State employment, the necessity for ascertaining all the lists that had been prepared by the United

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[13] It can hardly be supposed that the Legislature, while failing to scrutinize the Attorney General's lists carefully enough to note this distinction in nomenclature, nevertheless noted and appraised the listed organizations.

[14] The word subversive "will mean one thing to one officer, another to someone else." See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 176 (Douglas, J., concurring).

[15] The due process clause of the Fourteenth Amendment insures the orderly exercise of legislative power in the mode customary under the State Constitution, and prohibits arbitrary and unchanneled discretion. *See Douglas* v. *Noble*, 261 U. S. 165, 168; also *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 542-3; *Yick Wo.* v. *Hopkins*, 118 U. S. 356.

States Attorney General prior to April 9, 1951, with no guidance as to when or where the list or lists were published or what period a search for them must cover. The State court again assumed a fiction when it "assumed they (the lists) are readily obtainable" (R. 63). In fact, the only copies of any of the Attorney General's lists available in Oklahoma were a few of a "consolidated list" issued in October 1950, which were in the State law library.[16] But even if this list were obtained, the State employee could not depend upon it, or any other one or ones he discovered, as exhausting the indefinite and generally-inclusive coverage of the Oath;[17] he could never be certain of the negative proposition that there were no additional listings. While the State Attorney General referred to the 1950 list in his opinion on the Oath's application, he did not purport to rule, and probably did not know, whether this list was the most recent or definitive prior to the passage of the Act,[18] nor had the Legislature empowered him or any other agent to make such a determination.

An Oath which thus "fails to give adequate guidance to those who would be law-abiding",[19] and creating such un-

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[16] See Board of Regents' brief cited note 11, at page 31. As pointed out by appellants (brief, p. 63), the Attorney General's listing program was not directed at making the lists available to the public but only to the Loyalty Boards.

[17] The October 1950 list was not of course the only list compiled by the Attorney General. Indeed, this Court's opinion in *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, decided April 30, 1951, does not refer to the October 1950 list, but instead refers to several preceding lists. See 341 U. S. at pages 128-129, notes 3 to 5. The possibility, if a list were discovered, of a conscientious, but mistaken, reliance upon it without knowledge of other listings, is thus apparent.

[18] See Board of Regents' Brief, cited note 11, at page 29.

[19] *Musser* v. *Utah*, 333 U. S. 95, 96. Semble: *Connolly* v. *General Construction Co.*, 269 U. S. 385, 391; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453; *Pierce* v. *United States*, 314 U. S. 306, 311; *Winters* v. *New York*, 333 U. S. 507, 509-510.

certainty as to what is required to avoid the penalty of proscription from Government employment or a prejury prosecution, violates due process. And with the instant Oath, the Constitutional vice cannot be avoided as it was in the *Garner* case,[20] through importing the requirement of knowledge. For the State court has already indicated, by its validation of the Oath on the false assumption that the lists are readily available (R. 63) that the Oath-taker must be *certain* that none of the organizations with which he is affiliated have at any time prior to April 9, 1951 been listed by the Attorney General.[21]

C. The Oath violates the due process guarantee because it unreasonably restrains freedom of association.

1. Excessive Restraint Due to Uncertainty

Uncertainty is a particular vice in a statute affecting First Amendment rights because it necessarily results in an excessive restraint on these essential rights. And the evil of uncertainty is the greatest when the statute impinges on political expression, its protection being the most important function of the First Amendment. Thus, this Court in a nearly unanimous opinion in *Winters* v. *New York*, condemning for vagueness the statute there in issue, which penalized the publication of "stories of bloodshed", declared: "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."[22]

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[20] *Garner* v. *Los Angeles Board*, 341 U. S. 716, 724.

[21] The Legislature could hardly have meant to refer to knowing affiliation, since this construction would permit a person affiliated with a listed organization to lawfully take the Oath if he were ignorant of the listing, even if he had made no effort to ascertain the contents of the lists. And to construe the Oath as requiring some unspecified amount of effort to ascertain the contents of the lists, would merely again establish a vague and indefinite requirement.

[22] 333 U. S. 507, at page 518.

The right affected by the instant statute is precisely the kind where uncertainty is, according to this Court's suggestion in *Winters*, most noxious. For the non-affiliation Oath restrains a person's right to associate with his fellows of a like turn of mind to develop and express political, social, and economic views; this right—the right to assemble and associate—is "cognate to" and "inseparable from" the right of expression.[23] The Oklahoma Oath, showing on its face that a determination of its exact scope would be difficult if not impossible, would tend to cause a blanket abandonment, without an effort to ascertain its coverage, of association with any politically-focussed organization; and even if one set about an investigation of the Oath's meaning, he could not, as demonstrated above, achieve certainty as to the total of proscribed organizations. Thus, one subject to the Oath could not affiliate or continue affiliation with any organization dealing with political, social, or economic questions with assurance of legality; through any such affiliation he would fear he was violating the Oath and incurring the penalty of proscription. Thus, the Oath "offers * * * security"[24] only through total abstinence from association for societal objectives; it "blankets with uncertainty"[25] and thereby restrains this whole field of association for the large part of the population who either are State employees, or foresee the possibility of seeking State employment.

Assuming, arguendo, the validity of a conclusive bar to employment in terms of associations, Oklahoma's non-affiliation Oath is nevertheless clearly unconstitutional because it imposes an unjustifiably broad restraint on First Amendment freedoms by its indefiniteness and uncertainty.[26]

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[23] *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Thomas* v. *Collins*, 325 U. S. 516, 530-531. See *American Communications Association* v. *Douds*, 339 U. S. 382, 400.

[24] *Thomas* v. *Collins*, 323 U. S. 516, 535.

[25] *Ibid.*

[26] Compare, as to over-broad restraints, *Cantwell* v. *Connecticut*, 310 U. S. 296, 307; *Schneider* v. *State*, 308 U. S. 147, 162, 164; *Saia* v. *New York*, 334 U. S. 558, 562, 564.

2. Unreasonableness of Oath as Test of Fitness.

Even apart from the Oath's uncertainty and indefiniteness, it establishes an unreasonable bar to State employment and is therefore unconstitutional. At the outset, it is to be noted that insofar as this Court has indicated that affiliation alone, regardless of the affiliator's personal viewpoint, might ever be a conclusive bar to employment, it has dealt exclusively with organizations advocating or attempting overthrow of the government.[27] We submit that a conclusive proscription from employment because of any other affiliation is beyond the limits of the State's power to interfere with freedom of association. For from the standpoint of the Oath's purported objective of testing fitness, no other affiliation could be deemed an identification of persons unfit for all State employment; and from the standpoint of the detriment of an Oath, obviously the restraint on freedom of association would be broader and much more serious in its impact on free expression if affiliations other than with organizations advocating overthrow, were restrained. Since the sweeping prohibition of the Oklahoma Oath of affiliation with "communist front or subversive" organizations, restrains association with organizations other than those advocating overthrow of the Government, it is unconstitutional.

Furthermore, in view of the Attorney General's criterion for listing organizations as "subversive"—the only one of the Oath's terms he uses—Oklahoma's conclusive proscription from employment on the basis of affiliation with a listed organization is manifestly unreasonable. As this Court knows, when the Attorney General listed "subversive" organizations, he was defining and applying this nebulous term for the purpose of listing those organizations in which membership should be deemed some evi-

[27] Consider *Garner* v. *Los Angeles Board*, 341 U. S. 716, 720; *Adler* v. *Board of Education*, 342 U. S. 485, 495; *American Communications Assn.* v. *Douds*, 339 U. S. 382; *Gerende* v. *Board of Supervisors*, 341 U. S. 56.

dence of disqualification for Federal government employment; it was only necessary for the organization to be suspicious to the degree where membership therein might be an indication, subject to refutation by the member, that he was not suitable for government employment.[28] It is obviously unreasonable to lay down an absolute proscription from employment on the basis of membership in an organization about which nothing has been determined except that membership may be treated as *some evidence* of disqualification.[29]

As this Court further knows, it has not been established that any of the Attorney General's listings have a reasonable basis, and there is grave doubt of whether the Attorney General's procedure is a fair one that is conducive to an accurate finding or to any confidence in his determinations.[30] Certainly affiliation with a listed organization is not a reasonable bar to employment on the basis of the listing as such, unless the affiliator has reason to accept the listing as valid. For Oklahoma to compel a person to bow to the Attorney General's listings, and inflict on him the penalty of proscription from employment if he does not accept them, regardless of whether they are arbitrary, is clearly an unreasonable restriction of his opportunities for employment and of freedom of association.

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[28] See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, at page 127, note 2; at page 192 (dissenting opinion).

[29] The State court gave no consideration to the justifiability of the Legislature's use of the Attorney General's lists, indulging instead in the false assumption that the Legislature had considered the character of the listed organizations (discussed supra, pp. 9-11).

In view of the Legislature's falure to acquaint itself with the proscribed organizations or even with the pattern for listing them (supra, pp. 9-11), there was no such legislative deliberation as might justify any presumption of the reasonableness of proscribing them. As to the doctrine that a presumption does not in any event apply where the statute, as the instant one, affects First Amendment rights, see *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 96.

[30] *Anti-Fascist Committee* v. *McGrath*, cited supra.

III. The State's prohibition of any employment by the State except upon subscription to an oath denying past membership in unnamed organizations, violates the due process guarantee of the Fourteenth Amendment and Article I, Section 10, of the Constitution prohibiting bills of attainder and *ex post facto* laws.

The provision that "within five years immediately preceding the taking of this oath, I have not been a member * * * of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization", was interpreted by the State court to read that "within the five years immediately preceding the taking of this Oath, I have not been a member of any organization listed by the Attorney General as 'a communist front or subversive' prior to the date of passage of the Act, April 9, 1951" (see R. 63-64). Like the provision on current affiliations discussed in Point II, the Oath on past membership—despite its drastic paraphrase by the State court to refer, regardless of when taken, to listings before a fixed date in 1951—violates the due process guarantee of the Fourteenth Amendment. For, the past membership provision (1) accepts the arbitrary discretion of the Attorney General by adopting whatever meaning and policy he has read into the vague and elastic terms "communist front or subversive" (see supra, pp. 9-11); (2) the uncertainty as to the Oath's coverage (supra, pp. 11-12) means one must either suffer proscription from all State employment through refusing to take the Oath or risk sudden and stigmatizing forfeiture of his job and the charge of false swearing; and (3) this provision prohibits absolutely the employment of past members of organizations in which membership has merely been determined to be some indication of disqualification for Government employment, with the

fairness and trustworthiness even of this determination in grave doubt (supra, pp. 15-16).

But the past membership provision has vices in addition to those found in the current affiliation provision of the Oath. It is even more unreasonable and unprecedented, if viewed as an employment qualification, than the Oath on current affiliations. For it not only relies on affiliation, apart from the affiliator's personal belief, in organizations other than those advocating overthrow of the government (see supra, p. 15), but it goes to the very extreme in its reliance on "guilt by association" by proscribing from employment on the basis of *past* association with such organizations.[31] Not only does the Oath as to past membership thus violate due process, but it imposes an *ex post facto* penalty in violation of Article I, Section 10, of the Constitution.

Clearly the loss of one's means of livelihood and proscription from all opportunity for State employment is a drastic punishment. "Permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type" (*United States* v. *Lovett*, 328 U. S. 303, 315), particularly since "government employment so dominates the field of opportunity" (*Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 185, Jackson, J. concurring). Here the punishment of proscription from employment is imposed because of conduct which was not so penalized, nor indeed in any way held culpable by the State at the time thereof, nor even penalized, either then or now, by the Federal government in relation to Federal employment, as it now is by Oklahoma. Thus the Oklahoma Oath is precisely within the definition of an *ex post facto* penalty. For this Court, noting in *Garner* v. *Los Angeles Board* that "legislative action curtailing a privilege previously enjoyed" may be punishment, further pointed out that an Oath requirement "would be *ex post facto* if it imposed punishment for

[31] Compare cases cited, note 27, supra.

past conduct lawful at the time it was engaged in" (341 U. S. 716, 721, 722).

Indisputably, the Oklahoma Oath is entirely distinguishable from that upheld in the *Garner* case, which was saved from condemnation as *ex post facto* because its provisions had previously been incorporated in the City Charter. The explicit grounds for the Court's ruling in *Garner* was that "The activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over seven years before, and two years prior to the period embraced in the oath" (341 U. S. at p. 721). Similarly, in the conclusion quoted by the State court (R. 69) that punishment was not imposed by the *Garner* Oath, and in distinguishing the *Garner* situation from that in the *Lovett* case, this Court relied on the fact that the Oath was merely an implementation of the Charter provisions which had laid down "general and prospectively operative standards of qualification" (341 U. S. at p. 722). Contrariwise, the Oklahoma Oath as to past membership operates entirely retroactively; there was no proscription in effect prior to its passage with respect to organizations listed by the Attorney General, nor ever had Oklahoma prohibited State employment for members of organizations advocating overthrow of the government.

Indeed, like the Oaths in the *Cummings* and *Garland* cases,[32] this Oath is not only *ex post facto* but a bill of attainder. Here as there, the legislature has singled out ascertainable groups for punishment, identified by their past acts, without giving them any opportunity to avoid the penalty through present or future conduct. As this Court pointed out in *American Communications Assn.* v. *Douds*, in discussing the vice of the Oaths invalidated in the *Cummings* and *Garland* cases: "since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change

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[32] *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333.

the result" (339 U. S. 382, 414).[33] Indeed, the language of the *Garland* case is almost precisely applicable to Oklahoma's Oath:

> "As the oath prescribed cannot be taken by * * * (certain) parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the * * * ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertainment of the parties upon whom the act is intended to operate * * *" (4 Wall. at p. 377).

Finally, here as with the *Cummings* and *Garland* oaths, the argument that the Oath can be justified as a test of fitness must be rejected (see 4 Wall. 318-319, 379-380); for here as there past acts are not to be weighed in order to determine present personal qualification, but are used instead to establish a conclusive proscription from employment and employment opportunities.

The retroactively punitive aspect of the Oklahoma Oath is not only a violation of specific Constitutional limitations, but it also accentuates the restraint on freedom of association imposed by the Oath. For all associations will be approached fearfully and with restraint, if the State may, as in this Oath, seize on associations treated as innocent at the time for penalization at some unforeseeable time in the future.

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[33] The Court held that the Oath involved in the *Douds* case was not a bill of attainder because it barred a person from employment only on the basis of his present or future affiliation (339 U. S. at p. 414).

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed, and that Court should be directed to order appellees to make salary payments to appellants without regard to their failure to subscribe to the Oath provisions here in issue.

Respectfully submitted,

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